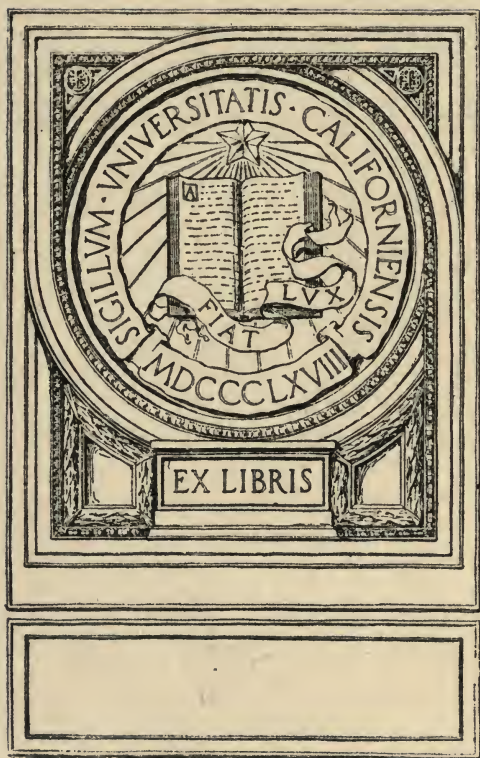
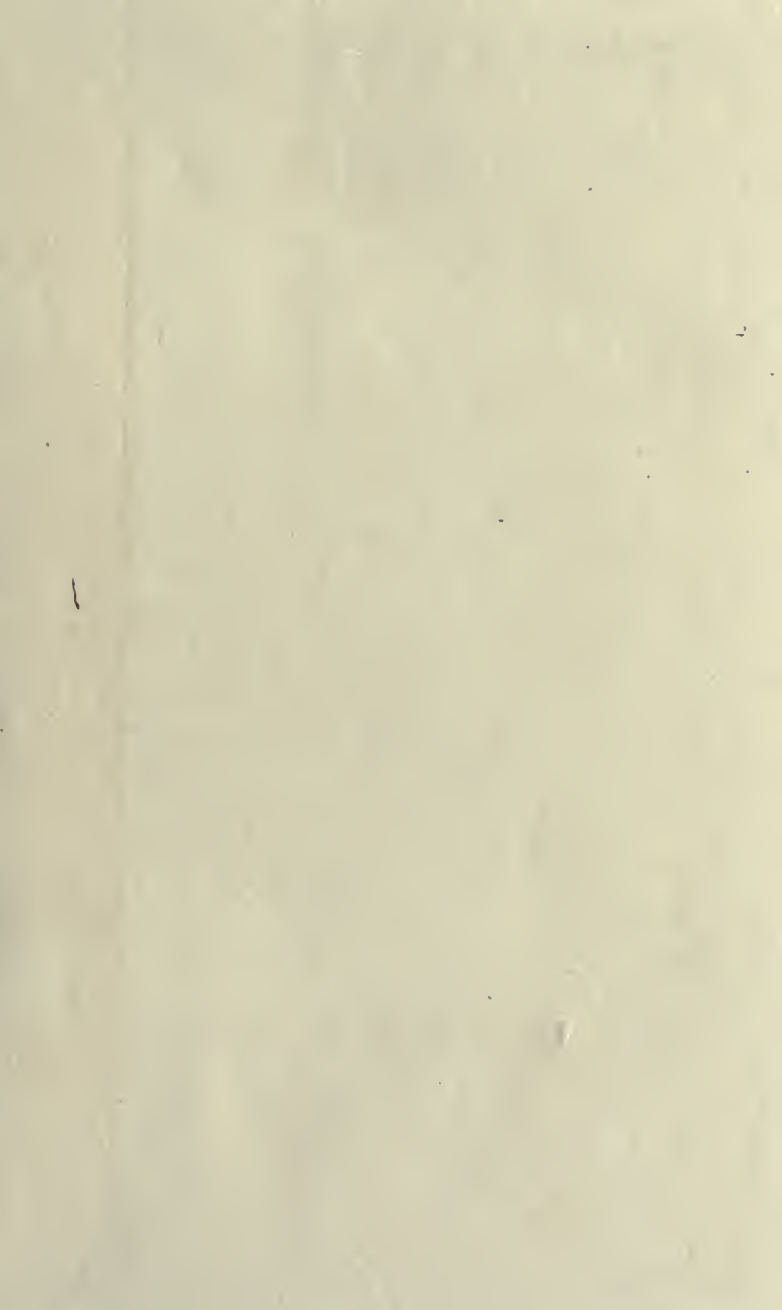










Digitized by the Internet Archive  
in 2007 with funding from  
Microsoft Corporation







**THE BULWARKS OF PEACE**

of the same year, 1871.

The first of these is the

second of the same year, 1871.

The third of these is the

fourth of the same year, 1871.

The fifth of these is the

sixth of the same year, 1871.

The seventh of these is the

eighth of the same year, 1871.

The ninth of these is the

tenth of the same year, 1871.

The eleventh of these is the

twelfth of the same year, 1871.

The thirteenth of these is the

# THE BULWARKS OF PEACE

BY

**HEBER L. HART, K.C.**

DOCTOR OF LAWS OF THE UNIVERSITY OF LONDON,  
RECORDER OF IPSWICH

PRINTED BY  
J. H. COOKE, 15, N. B. ROAD, LONDON, E.C. 4.

**METHUEN & CO. LTD.**  
**36 ESSEX STREET W.C.**  
**LONDON**

JX1953  
H3

*First Published in 1918*

NO. 1000  
ANNOUNCED

## PREFACE

**M**ANKIND are at length fully alive to the terrible evils of war. But, in order that everything possible may be done to avoid these evils in the future, it is necessary that those who influence the opinion of the various nations should have a clear apprehension of all the means which are available for the preservation of peace, and, at the same time, that they should appreciate the danger of placing excessive reliance upon the efficacy of any particular measure.

At present there appears to be a disposition on the part of many generous minds to believe that the formation of a League of Nations for the purpose of preventing wars will in itself result in the practical maintenance of general peace. It certainly, indeed, seems probable that a confederacy of this kind, which has been advocated by several great thinkers in the course of the last few centuries, will be actually established at no distant date. In order, however, that the new organization may be well adapted for the fulfilment of its function much consideration will have to be given to its constitution and to the nature of the covenants to be

entered into by the confederating states. And, in any case, it is desirable to recognize the fact that it could not possibly achieve complete success until such moral and political conditions prevail throughout the world as would ensure that these covenants should in all circumstances be observed or enforced. Accordingly, the widespread assent which has already been given to the suggestion of a League of Nations does not by any means dispense with the necessity of the continued study and pursuit of all "the things which make for peace."

In every department of science or art there are fundamental principles and facts upon which its students and professors alike proceed. No problem, indeed, can be studied effectively without some previous acquaintance with the subject in connexion with which it arises. And if we seek to ascertain the best means of securing peace it is well that we should keep in view the elements of social order. We ought to take into consideration the relation of war to the evolution of humanity; the causes of wars in modern times; the reasons for the difficulty of entirely eliminating or completely counteracting these causes; the influences and forces whereby men living in communities are inclined or constrained to orderly behaviour, and the extent to which these influences and forces are applicable to nations and states; the scope of general rules and administrative ordinances respectively in relation to social order; the nature and practical

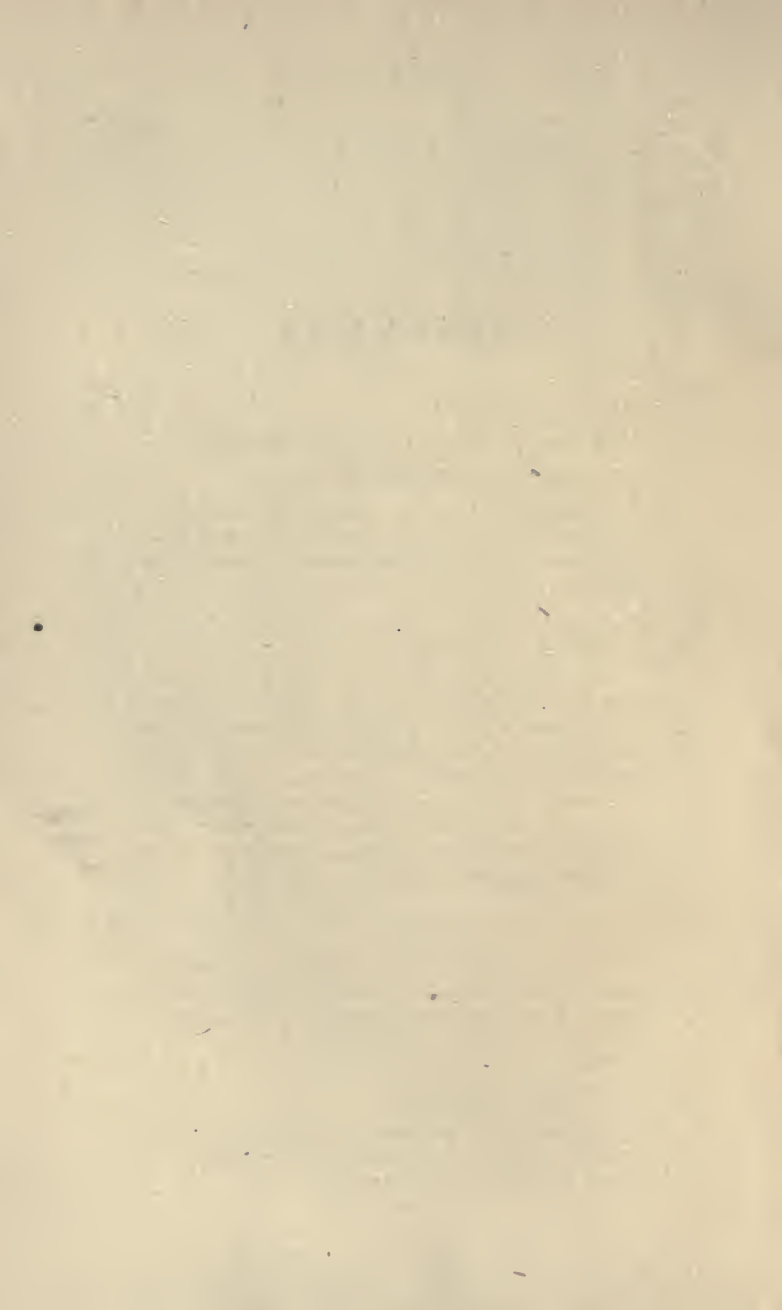


value of International Law ; the essential sanction of right ; the social function of force ; the processes whereby an aggregate of individuals coalesces into an organized society ; and the special functions of the English-speaking peoples in relation to world-order.

Many manuals of war have been written : this little work is intended to be a Primer of Peace. It is an attempt to provide a compendious statement of the material facts and guiding principles which should be borne in mind by anyone who is considering what ought to be done by the governments and peoples of the various states of the world with the object of preventing the outbreak of wars in the future. In the Table of Contents the effect of each chapter is stated in the form of a distinct proposition. The reader will therefore be able by glancing at this Table to perceive at once the lines upon which the text proceeds.

H. L. H.

*March 1918*



# CONTENTS

| CHAP.                                         | PAGE |
|-----------------------------------------------|------|
| I. THE GREAT ASCENT . . . . .                 | I    |
| SECTION I. From Anarchy to Goodwill . . . . . | I    |
| SECTION II. From War to Peace . . . . .       | 8    |

PROPOSITION I.—The natural progress of mankind involves the development of a social conscience which will ultimately secure the prevalence of goodwill and peace.

|                                |    |
|--------------------------------|----|
| II. THE REAL DANGERS . . . . . | 17 |
|--------------------------------|----|

PROPOSITION II.—Until the world as a whole has coalesced into a universal social community, the movements of the spirit of nationality, the natural changes in the relative vigour and population of nations, and the desires of ambitious states for enlarged dominion, will from time to time cause wars unless appropriate measures to prevent them are taken collectively by all states or such of them as together possess preponderant power.

|                                    |    |
|------------------------------------|----|
| III. A JURISTIC ILLUSION . . . . . | 28 |
|------------------------------------|----|

PROPOSITION III.—No method of preserving peace which would involve the existence of a common and plenary sovereignty over the Great Powers is at present practicable.

|                                   |    |
|-----------------------------------|----|
| IV. THE FEDERAL DILEMMA . . . . . | 43 |
|-----------------------------------|----|

PROPOSITION IV.—Peace can be forcibly maintained only by means of the co-operation of states as separate political entities.

|                                   |    |
|-----------------------------------|----|
| V. THE FOUNDATIONS OF PEACE . . . | 49 |
|-----------------------------------|----|

PROPOSITION V.—States will be inclined to a peaceable disposition by the moral elevation of their citizens ; the correspondence of national sentiment with political allegiance ; the existence of representative government ; and the prevalence of social relations between the various peoples.

|                                     |    |
|-------------------------------------|----|
| VI. THE REGULATION OF CONDUCT . . . | 56 |
|-------------------------------------|----|

PROPOSITION VI.—The conduct of individual men is controlled externally by unregulated force, administrative authority, sacerdotal authority, custom, convention, positive law, the social imperative and public opinion.

|                                  |    |
|----------------------------------|----|
| VII. THE CONTROL OF STATES . . . | 77 |
|----------------------------------|----|

PROPOSITION VII.—All the means whereby the conduct of individuals is regulated, except positive law, are available for the preservation of peace in the society of states.

|                                                   |    |
|---------------------------------------------------|----|
| VIII. THE RELATION OF POSITIVE LAW TO ORDER . . . | 88 |
|---------------------------------------------------|----|

PROPOSITION VIII.—The importance of positive law in the regulation of the conduct of civilized mankind tends to diminish.

|                                  |     |
|----------------------------------|-----|
| IX. THE ESSENTIAL SANCTION . . . | 104 |
|----------------------------------|-----|

PROPOSITION IX.—The proper function of force in the regulation of conduct is the provision of a standing probability that violent opposition to the general will of a society will be restrained or punished ; and the force of any society is necessarily adequate for this purpose.

|                       |     |
|-----------------------|-----|
| X. PUBLIC RIGHT . . . | III |
|-----------------------|-----|

PROPOSITION X.—The system known as International Law, even if reinforced by an effective sanction, would be an inadequate basis of public right.

| CHAP.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | PAGE |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| XI. THE INTERDEPENDENCE OF STATES . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 128  |
| <p style="margin-left: 40px;">PROPOSITION XI.—The process of coalescence whereby the world is developing into a social community involves inequalities between the several states and excludes the possibility of the complete independence of all.</p>                                                                                                                                                                                                                                                                                                                                                                         |      |
| XII. INTERNATIONAL ADMINISTRATION . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 136  |
| <p style="margin-left: 40px;">PROPOSITION XII.—In order that peace may be maintained administrative action is as necessary as insistence upon general rules in the society of states.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                       |      |
| XIII. RIGHT AND MIGHT . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 146  |
| <p style="margin-left: 40px;">PROPOSITION XIII.—Right is secure against the might of wrongdoers only if it is itself supported by the greater might of others.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                              |      |
| XIV. THE DUTY OF INTERVENTION . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 150  |
| <p style="margin-left: 40px;">PROPOSITION XIV.—Every state is morally bound to co-operate with other states in maintaining public right and preserving the general peace.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                   |      |
| XV. A LEAGUE OF PEACE . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 157  |
| <p style="margin-left: 40px;">SECTION I. The Disposition towards Confederation . . . . .</p> <p style="margin-left: 80px;">157</p> <p style="margin-left: 40px;">SECTION II. The Conception of a League . . . . .</p> <p style="margin-left: 80px;">160</p> <p style="margin-left: 40px;">SECTION III. The Functions of the Powers . . . . .</p> <p style="margin-left: 80px;">164</p> <p style="margin-left: 40px;">SECTION IV. The Essential Conditions . . . . .</p> <p style="margin-left: 80px;">173</p> <p style="margin-left: 40px;">SECTION V. The League in Action . . . . .</p> <p style="margin-left: 80px;">184</p> |      |
| <p style="margin-left: 40px;">PROPOSITION XV.—In order that the duty of all states to each and of each to all may be fulfilled, the states should, by a treaty of alliance, constitute a representative body charged with the function of determining the administrative and executive measures which may from time to time</p>                                                                                                                                                                                                                                                                                                 |      |

CHAP.

PAGE

be necessary for the preservation of peace, and agree together that they will respectively co-operate with one another in carrying such measures into effect.

## XVI. CUSTODES PACIS . . . . . 188

PROPOSITION XVI.—In any circumstances which can now be contemplated, in order that peace may be maintained, it will be necessary that the British and American Commonwealths should together take the principal part in the measures required for the prevention of wars; and the greater the power of these Commonwealths and the closer their association may be, the greater will be the probability that such measures will be successful.

## XVII. THE BRITISH UNION . . . . . 208

PROPOSITION XVII.—The Federation of the British Commonwealth of Nations is an essential condition of the maintenance of general peace.

# **THE BULWARKS OF PEACE**





# THE BULWARKS OF PEACE

## CHAPTER I

### THE GREAT ASCENT

#### SECTION I

#### FROM ANARCHY TO GOODWILL

**I**F we look back steadily upon all that is known to us of the nature and condition of mankind in past times and then review justly the state and apparent tendencies of the race at the present day we shall hardly fail to discern the track of a spiritual ascent. Our vision cannot reach downwards to the immeasurable depths of the beginning of the stupendous journey; and the goal of its completion is still hidden in the secret places of destiny. But from the outlines which are faintly traceable of the earliest stage which is at all within our ken and the trend of the progress which has been since maintained we may well infer that men began their life upon this planet in the abysmal darkness of anarchy and that they will never cease to struggle upward until they reach the genial atmosphere of a universal commonwealth of goodwill.

It is true that this great objective is still so far

above us that we cannot even form a clear and definite conception of the conditions which would prevail in a society of human beings entirely emancipated from the dominion of force—a society in which the life of every one should be regulated by the gentle sway of a beneficent conscience. But already it would seem that the inhabitants of the earth, regarded generally, are not so far below the standard of such a community as they are above that of the world as it was during the earliest period of the existence of our race. In any case the past must be compared carefully with the present if we are to have an adequate perception of the promise of the future.

The habits and disposition of human beings at the time of the origin of their species cannot of course be ascertained with precision or certainty. But, from the data at our command, we may infer that they were speechless creatures, devoid of self-consciousness, incapable of reasoning, and without any definite perception of right or wrong ; and that they were dependent for the maintenance of existence solely upon the use of their bodily organs.<sup>1</sup> They must indeed have been so utterly unlike the men of to-day that they elude our apprehension altogether. It is impossible even for imagination to reconstruct a credible picture of their daily lives. It is, however, only reasonable to suppose that the farther we could penetrate backward into the history of our ancestors the more humbly endowed we should find them. Only the eye of omniscience could have discerned in primitive men the germs of humanity as we know it now.

<sup>1</sup> See Romanes' *Mental Evolution in Man* (1888), pp. 345-7.

When, after the passage of ages, the faculty of articulated speech had been acquired the development of reason became possible and the intellectual advance of mankind began. But the evidence of language itself indicates that a vast period must have elapsed after its use had been acquired before morality and conscience were evolved. A close examination of words, "those oldest prehistoric testimonies," reveals the fact that all moral notions contain something morally indifferent. The words indicating good and evil had originally no moral import. They are metaphorical extensions of the meaning of words which originally had only material significations. Thus "right" means straight and "wrong" twisted. "This seems to show that language is older than morality"—that it dates from a period when a moral judgment, a knowledge of good and evil, had not yet dawned in the human mind. Had the ideas of good and evil and of right and wrong been innate it would naturally have followed that we should have had original words for them.<sup>1</sup>

When we pass on towards the close of the prehistoric period we are able to recognize the men and women of whom we there catch dim and distant glimpses as fellow-creatures of our own. But we find that their characters were still unsocial and their lives comparatively speaking isolated.

"If," said Sir Henry Maine,<sup>2</sup> "I were attempting, for the more special purposes of the jurist, to express

<sup>1</sup> Romanes, *Mental Evolution in Man*, citing Geiger, pp. 346-7; Lord Avebury, citing Emerson, in *Origin of Civilisation*, 6th ed. pp. 421, 425.

<sup>2</sup> *Ancient Law* (Sir F. Pollock's ed.), p. 133.

compendiously the characteristics of the situation in which mankind disclose themselves at the dawn of their history, I should be satisfied to quote a few verses from the *Odyssey* of Homer. . . . ' They have neither assemblies for consultation nor *Themistes*, but every one exercises jurisdiction over his wives and his children, and they pay no regard to one another.' These lines are applied to the Cyclops, and it may not perhaps be an altogether fanciful idea when I suggest that the Cyclops is Homer's type of an alien and less advanced civilization ; for the almost physical loathing which a primitive community feels for men of widely different manners from its own usually expresses itself by describing them as monsters, such as giants or even (which is almost always the case in Oriental mythology) as demons. However that may be, the verses condense in themselves the sum of the hints which are given us by legal antiquities. Men are first seen distributed in perfectly insulated groups, held together by obedience to the parent. Law is the parent's word."

But " whether we have regard to actual history, to tradition, to antiquarian remains, or flint implements, we obtain uniform evidence of a continuous process of upward development." <sup>1</sup>

It is not necessary for the present purpose to attempt to trace the painful progress of human civilization. It is sufficient to glance at its results as we now see them.

" What a piece of work is a man ! How noble in reason ! how infinite in faculties ! in form and moving how express and admirable ! in action

<sup>1</sup> Romanes' *Mental Evolution in Man* (1888), p. 390.



how like an angel ! in apprehension how like a god ! the beauty of the world ! the paragon of animals ! ”<sup>1</sup>

It is truly an immeasurable distance which separates the intelligence of men whose voices reach across the oceans and whose hands can weigh the very stars from that of their mute and groping ancestors of the primeval world.

When, however, we consider the social and moral nature of mankind, we discern the results of a progress which is more wonderful still.

Man, as we now know him, has the faculty of discriminating between right and wrong. There is an active principle in his soul whereby, when two alternative courses are presented to his mind, he feels an obligation to select the one which he perceives to be in conformity with the right. By this characteristic quality of his conscience man is completely differentiated from the brutes.

It is true that there is not yet a correspondence which approaches at all closely to uniformity in men's perceptions of the right and that each individual may from time to time find it difficult or even impossible to perceive the obligation incumbent upon him in the circumstances of a particular situation. Nor, owing to the gradual development of the faculty of conscience, the continued insistency of the animal desires of mankind, the limitations of intelligence, and the complicated and varying conditions of social life, could it well be otherwise. And accordingly many philosophers have done much to depreciate the substantive importance of this faculty in the eyes of ordinary men by insisting upon its entire dependence upon

<sup>1</sup> *Hamlet*, ii. 2.

the effects of education, the association of ideas, the perception of utility, or a particular form of belief in the unseen. It is, however, important to lay firm hold upon the outstanding truth that, so far as regards historic times, conscience is the essential fact of human existence—the supreme and distinctive quality of mankind—the fundamental element upon which society depends. It is the Alpha and the Omega of moral progress.

It would seem that the extent of the dominion of conscience has been steadily increasing ever since the dawn of civilization. When men first awoke to the sense of duty its scope was probably limited to their conduct in relation to members of their own family or tribe. But at the present time it is manifest that, in the case of all the more advanced races, conscience takes cognizance of duty to mankind at large. There can indeed be comparatively few sane and educated people now living in the civilized world who would not recognize that in certain circumstances any human being might have a claim upon their consideration.

It is not of course practicable to measure accurately the extent of the moral progress which mankind have accomplished hitherto. But certain salient facts go far as indications of the present position.

The great majority of human beings now live in large communities. Order normally prevails throughout the several social aggregates. Taking the world as a whole, tranquillity is the rule; violence is the exception. Most people observe the laws and customs of their respective countries willingly, and usually without consciously adverting to the sanctions by which they are enforced. Aliens and

strangers are protected by governments and generally treated with courtesy by the citizens of the states in which they are temporarily resident. A difference between right and wrong is everywhere assumed ; and conduct which is wrong is for the most part recognized as a deviation from the ordinary course of affairs. All civilized men are capable of understanding the precept : " Whatsoever ye would that men should do to you do ye even so to them." By a large proportion of mankind this precept is felt to be obligatory. Many seriously endeavour to follow it in practice ; and people who in the main succeed in doing so are to be found everywhere, and everywhere in the long run are regarded with admiration and affection. So obvious indeed has the essential harmony of good-nature with the conditions of social life become that even those who are selfish and unjust themselves are generally disposed to prefer that better qualities should be cultivated by others. In short, already the dominion of the social sense is far more extensive than that of brutish ferocity and irrational hatred. Already we can almost imagine that there might be a society of morally perfect men : for people who at least suggest that conception figure in the records of history and are encountered in ever increasing numbers in contemporary life.<sup>1</sup>

If then it is to be assumed that man commenced his career entirely under the dominion of selfish impulses, when we review his present moral condi-

<sup>1</sup> It is not thought necessary to deal specifically with the present condition and prospects of the most backward races now existing ; for it cannot reasonably be supposed that the future lies with them.

tion it seems reasonable to anticipate that he will ultimately attain a state in which he will be under the complete direction of an elevated conscience.

A particular nation may have grounds for gloomy forebodings and doubts as to the continuance of its own advance along the upward path of social progress. But in the contemplation of the future of the human race collectively an optimistic view is the necessary result of an adequate perception of the true relation of the present to the past.<sup>1</sup>

The instincts which men have shared so long with wild and savage animals have naturally been manifested in selfishness and cruelty. Naturally also the supremacy of the developed conscience will in the fullness of time ensure the prevalence of sympathy and goodwill.

## SECTION II

### FROM WAR TO PEACE

It seems probable that, for a very long period after men had become capable of rational communication with one another, their state of life continued to be anarchical and that in any relations into which they were from time to time brought together unregulated force had free play. Outside the narrow limits of their family groups they were reciprocally hostile. Conflict was the

<sup>1</sup> "I remain persuaded," said the late Lord Avebury, "that the past history of man has, on the whole, been one of progress, and that, in looking forward to the future, we are justified in doing so with confidence and with hope" (*Origin of Civilisation*, 6th ed. p. 552).



usual result of the contact of one group with another. Existence passed in isolation varied by strife.

Accordingly man had to achieve his great ascent to a very large extent by means of war. The general belligerency of the race brought about its own partial remedy ; for the earliest social order seems to have been indirectly due to war. War caused the union of family groups into larger groups, and again the coalescence of these groups into still larger aggregates ; and in this way it promoted peace and order between the individuals who thus became associated in the enlarged communities. Internal peace was purchased at the price of external war. In a sense civilized states are the result of the travail of humanity in barbaric strife.

“Coherence,” said Herbert Spencer, “is first given to small hordes of primitive men during combined opposition to enemies. . . . At first the unions exist only for military purposes. Each component society retains for a long time its independent internal administration, and it is only when joint action in war has become habitual that the cohesion is made permanent by a common political organization.”<sup>1</sup> “Everywhere the wars between societies originate governmental structures, and are causes of all such improvements in those structures as increase the efficiency of corporate action against environing societies.”<sup>2</sup>

But throughout the greater part of the historical period, except so far as strife was excluded by the effects of these processes of coalescence or absorption, war remained the normal condition of man-

<sup>1</sup> *Principles of Sociology*, vol. ii. pp. 278, 279.

<sup>2</sup> *Ibid.* vol. i. p. 540.

kind. The communities into which men were divided, even after they had attained a size and degree of internal order entitling them to the character of states, so far as they came into contact, were habitually antagonistic in their relations with one another. To the citizen of one state the citizen of another state was normally an enemy. The formation of great empires from time to time enlarged the areas within which internal peace prevailed; but these empires themselves were for the most part at war with other peoples. No condition approaching that of a stable equilibrium between independent states was indeed practicable until civilization had attained a very advanced stage. History, until it reaches comparatively modern times, is in the main a narrative of wars.

In the realm of thought the evils attendant upon defeat in war must always have been recognized. But so long as fighting and the preparations for carrying it on were among the chief concerns and interests of life, and martial prowess passed for the supreme glory of mankind, it is not to be supposed that ordinary people would regard war in itself as an evil. The revolt of the human soul against the carnage of the battle-field and the holocaust of homesteads could proceed only *pari passu* with the moral advancement of mankind. Only in proportion as men became more sympathetic with their fellows and more interested in the sufferings of others did they concern themselves with the distinction between a just and an unjust war and with the means of preventing wars altogether. In a word, the increasing aversion from war and preference for peace is only one aspect of the progress

of the race from the nature of the brute towards that of the perfect man.

Naturally with regard to war, as with regard to conduct generally, great thinkers and moral teachers often proved themselves far in advance of their contemporaries. Even thousands of years ago ever and anon some voice was raised in an effort to impress upon mankind the more elevated and essentially reasonable view.

Thus Micah, the Hebrew prophet, foretelling the conduct of men in a happier age than his own, wrote : " They shall beat their swords into plowshares, and their spears into pruning-hooks : nation shall not lift up a sword against nation, neither shall they learn war any more. But they shall sit every man under his vine and under his fig tree ; and none shall make them afraid." <sup>1</sup>

Plato, Aristotle, Sallust, and many others of the wise men of Greece and Rome, clearly perceived and boldly proclaimed that war should be carried on only for the sake of peace.<sup>2</sup> " Wars," said Cicero, " are to be undertaken for this end, that we may live in peace without being injured. . . . In engaging in war we ought to make it appear that we have no other view but peace." <sup>3</sup>

And no one will forget the essentially Christian message : " On earth peace, good will toward men." <sup>4</sup>

It is not necessary here to trace in detail the

<sup>1</sup> Micah iv. 3, 4. Cp. Isaiah ii. 4.

<sup>2</sup> Plato's *De Legibus*, lib. i. p. 628 of Stephens' ed. ; Aristotle's *Politics*, vii. 14, 15 ; Sallust's *Epist. I. Ad C. Cæsarem*, p. 345 of ed. Gottlieb Cortii.

<sup>3</sup> *De Officiis*, translation by C. R. Edmonds (Bohn's Classical Library), i. 11, 23.

<sup>4</sup> Luke ii. 14.

progress of thought upon this subject. Some of the more important of the attempts which have been made by eminent publicists to enlist the sympathies of mankind in the cause of peace will be referred to in other parts of this treatise. It is sufficient to point out in this place that, for many years past, the numbers of those who have been writing and working with the express object of preventing wars have continually and vastly increased.

Moreover, as the world has grown older wars have in fact steadily diminished in frequency. If, for example, we compare the records of the years between 1815 and 1914 with those of any earlier period of the same length, we shall see that peace prevailed between the various peoples of the earth to a greater extent after the battle of Waterloo than it had ever done before.

It was indeed natural that this should have been so. The governments and citizens of the leading countries were, for the most part, in a higher state of moral development in the nineteenth century than in earlier times. Accordingly, in the course of that century a disposition towards unjustifiable aggression was manifested less frequently than before. The representatives of different states were drawn more closely together in friendly intercourse, while the commercial relations between the inhabitants of divers parts of the world were greatly developed. Disputes between governments of a kind which in previous centuries would have resulted in strife were in many instances adjusted by diplomatic negotiation before they had reached a critical stage, and in some instances even after that point had been passed. There was also an increasing dis-



position on the part of statesmen to submit their controversies to the reasoned decision of impartial minds.

Many disputes, including several of an undoubtedly menacing character, were thus peaceably adjusted by arbitration. By the latter part of the century, indeed, the precedents for this course had become so numerous in certain kinds of controversies, particularly those regarding boundaries and claims to indemnities, that in such cases arbitration had become the established form of procedure as between many states. The facilities for obtaining a satisfactory adjudication by this means were, moreover, rapidly being improved.<sup>1</sup> It had, in fact, become apparent that a standing tribunal, constituted in such a way as to command general confidence and open to all who might be willing to resort to it, afforded as to most disputes a beneficent alternative to war analogous to the remedy afforded by ordinary municipal tribunals in lieu of the duel and other forms of self-redress.

During this century also the Powers acted in concert to a greater extent than had ever been the case before.

From 1815 until 1914 Britain, indeed, was only once engaged in a war with another great Power ; and whether or not the conflict with Russia ought to have been avoided has been a matter of controversy among Englishmen ever since its commencement.

<sup>1</sup> For a summary of the provisions made at the Hague Conferences for international commissions of inquiry and mediation, a permanent panel of arbitrators with an international bureau to serve as record office and secretariat, and a permanent administrative council to control the bureau, see Lawrence's *Principles of International Law*, 4th ed. pp. 577-84.

And in the early part of the year 1914 it seems fairly safe to say that there was throughout the Empire a general disposition towards peace. Probably never before had so large a proportion of the electorate of the United Kingdom been decidedly averse from war and firmly bent upon industrial progress and the social improvement of the community. It is true that Britain might still, for a time at all events, have remained at peace, and that, nevertheless, she, upon her own initiative, declared war against Germany. But it is also true that it was believed by her own citizens generally, as well as by the large majority of well-informed neutrals, that, in taking the course which she did, Britain was faithfully discharging a stern and terrible duty and fulfilling a solemn obligation as a trustee of civilization. No unprejudiced and instructed observer could regard the action of the United Kingdom as in itself a disturbance of the peace, or as in any way inconsistent with a due regard for the importance of avoiding war. Accordingly, so far as the British Empire is concerned, the events of August 1914 and their consequences afford no evidence whatever that the hatred of war and the love of peace, which previously had been steadily increasing, had then sustained an even momentary check.

At the present time, moreover, there can be no reasonable doubt that, largely as a result of the Great War, there is throughout the world a more general and intense aversion to armed strife than ever existed at any previous epoch. The vast majority of civilized men now not only regard peaceful relations between the various states of the



world as normal, but clearly realize that even an occasional war may be a truly terrible calamity. They accordingly perceive that grave moral guilt attaches to those who draw the sword except upon the clearest necessity and in pursuance of a sense of duty. They are consequently willing to entertain any suggestions directed to the establishment of a lasting peace which may appear to be reasonable and practical.

The very fact that henceforth, if war is waged at all, it will be likely to proceed on a scale greater than any known before the Great War, is in itself calculated to strengthen and perpetuate the reluctance to disturb the peace. So long, indeed, as the impression made by the events of this colossal strife remains vivid in the minds of men we may feel assured that the spirit of humanity will be sternly resolved that no similar evil shall afflict the race.

Having regard to the foregoing considerations we may justly feel confident that wars of any kind will prove fewer and farther between as time rolls on.

In particular, genuine disputes of a justiciable nature will almost always be settled peaceably. Unless either party wishes for war, the state which asserts what it believes to be a definite right recognized by a pre-existing standard of justice and the state which denies that right, will both alike perceive that the issue between them ought to be determined by negotiation, mediation, arbitration, an appeal to a congress of states, or some other peaceable process.

It is indeed a cardinal and manifest truth in

this connexion that the moral progress of mankind involves an increasing tendency towards peace.

“Nature guarantees the coming of perpetual peace, through the natural course of human propensities: not indeed with sufficient certainty to enable us to prophesy the future of this ideal theoretically, but yet clearly enough for practical purposes. And thus this guarantee of nature makes it a duty that we should labour for this end, an end which is no mere chimera.”<sup>1</sup>

The increase of goodwill on the part of men towards one another as individuals, by which hostility and indifference are being steadily banished from human society, involves a corresponding amelioration of the mutual relations of the independent political communities among which the race is distributed. States themselves, though somewhat more tardily than individuals, are passing away from the epoch of anarchy and hostility towards a social condition of prevailing goodwill and peace.

PROPOSITION I.—The natural progress of mankind involves the development of a social conscience which will ultimately secure the prevalence of goodwill and peace.

<sup>1</sup> Kant's *Perpetual Peace*, translated by Miss M. Campbell Smith, p. 157.

## CHAPTER II

### THE REAL DANGERS

**I**N order that those who desire to make effective provision against the outbreak of wars should attain the greatest possible measure of success, it is necessary that they should appreciate the causes from which, in the absence of such provision, wars would be likely to arise. These causes have generally been for the most part overlooked by those who have hitherto propounded schemes for the establishment of perpetual peace.

War is often regarded as the litigation of states. This partial and inexact conception of its nature is closely associated with the assumption that all the differences and difficulties which may hereafter arise between states will be susceptible of satisfactory settlement by the application of rules of International Law, and, accordingly, that arbitration in accordance therewith should prove a complete, as well as efficient, substitute for war. It is of the greatest importance to recognize clearly at the outset of an inquiry such as is pursued in this treatise that this assumption is untenable. Only when this is perceived can we be in a position to apply our minds steadily to the grave difficulties of the matter in hand and at the same time be

secure against the risk of pursuing a dangerous illusion.

Many wars have been due to genuine disputes or controversies between two or more states as to their respective rights or duties under rules generally recognized as obligatory. In any such case war having been a method of pursuing a claim based upon an alleged right under a pre-existing rule may be said to have borne a certain resemblance to an action at law. This being so the important consequence is naturally observed that arbitration would have been an appropriate and effective substitute for war. And we have seen in the preceding chapter that there is good ground for hoping that henceforth controversies of this character will in fact be settled by arbitration or some other cognate process.

Most wars of the past, however, by reason of their causes and the objects of the belligerents, have borne no real analogy to litigation. And, if wars arise in the future, it is probable that they also will bear no such analogy ; or, at all events, that they will arise from difficulties for which International Law, as at present understood, provides no solution, and for which arbitration, or any similar method of decision, according to a standard of right now recognized, would be no remedy at all.

International Law is a system of rules which purports to govern the relations of states. It ignores the existence of nations.

In all regions of the world where settled government exists, every inhabitant, speaking generally, is both a member of a nation and a citizen of a state.



A nation, or people, or race, is a "large number of human beings, united together by a common language,<sup>1</sup> and by similar customs and opinions, resulting usually from common ancestry, religion, and historical circumstances."<sup>2</sup>

A state is a community bound together by a common political allegiance.

"A state may be co-extensive with one people, as is now the case in France,<sup>3</sup> or may embrace several, as is the case with Austria. One people may enter into the composition of several states, as do the Poles and the Jews."<sup>4</sup>

The collective affairs of human beings are managed by the governments of the states to which they belong. The government of a state is the organ by which its citizens collectively communicate with the citizens of another state through the government of the latter. The inhabitants of the civilized world, moreover, generally recognize the implications of the fact that they are grouped into separate states and that the world consists of a society of states. A nation as such is, according to established custom, inarticulate. It is assumed indeed to be incapable of relations with a state or with another nation.

It follows that, at all events as a matter of form, war is made by states and not by nations. A breach

<sup>1</sup> This is generally but not universally the case.

<sup>2</sup> Holland's *Jurisprudence*, 11th ed. p. 46. Prof. Holland speaks of a "people"; but the present writer adopts his language as equally applicable to the word "nation," which is perhaps more commonly used in the present connexion.

<sup>3</sup> *i.e.*, considered apart from the possessions of the Republic outside Europe.

<sup>4</sup> Holland's *Jurisprudence*, 11th ed. p. 46.

of the peace between inhabitants of adjacent countries, if it were not followed by war between the states to which they respectively belonged, would be regarded by statesmen and jurists merely as a lawless outbreak to be repressed according to the criminal code of one or other of those states.

The relations between states are then of cardinal and exclusive importance in respect of the final issue of war or peace. But the relations between nations, although indefinite and not susceptible of jural recognition, may in fact determine the relations of states.

Nations are living organisms. As such they are necessarily involved in continual change ; but there is no uniformity in the ways in which they severally change. Differences between them in respect of nature and environment, with the consequent actions and reactions of the one upon the other, result in vast differences in the changes which the nations themselves undergo. Accordingly, they vary relatively as well as absolutely. While one increases in numbers and strength, another declines. While one is being born, another may be dying.

The nations are the physical bases upon which the states exist. Owing, therefore, to the varying changes in the nations, the states themselves are constantly changing in their respective populations and relative power. The people of one state may be pressing upon its borders with a powerfully expansive tendency, while that of a neighbouring state is steadily declining in numbers. The wealth and military strength of the former may be increasing by leaps and bounds, while the spirit and the resources of the latter are falling below the level



which they reached in the days when its territory was acquired.

Changes in nations also lead to changes in states in another and very different way. The function of the state is to enable the nation to realize itself in social life—to provide it with the political structure necessary to internal order and to its corporate solidarity in relation to the external world. Accordingly, where a state fails to perform this function properly and with satisfaction to the people concerned, a tendency towards change is sooner or later created which in the long run may affect the society of states at large.

Where, for example, a nation is distributed among two or more states, although the sense of solidarity between its several portions may for centuries have lain almost dormant, the racial spirit may gradually awake to a realization of its common nationality. If then the mutual attraction and the desire for political coalescence rise into activity and power, the relations between the states concerned naturally become disturbed and ultimately altered. Or where, again, a nation, or part of a nation, is comprised, together with another people, within one and the same state, the former may become impatient for a separate political existence. Here also the realization of the national aspiration can be attained only by means of an alteration in the composition of the society of states.

It follows that there is a physical or natural basis for a constantly operating tendency to change in the relations and territorial extent of the various states of the world. The changes in the absolute and relative strength of nations and the spirit of

nationality in its rise or fall are continually setting up tendencies to disturbance of the order which for the time being exists in the society of states, and thus preventing the establishment of a condition of stable equilibrium.

Accordingly we find that, ever since states were first formed, the political geography of the world has been constantly changing and the balance of power shifting. The boundaries of the various empires, kingdoms, and republics, as well as their relative strength, have been varying throughout the whole of the historical period. If maps, showing the territorial distribution of the states of Europe, or of the world, at the end of each century, say even for the last five hundred years, be compared, the vast extent of the changes which have been taking place will at once be apparent. "The history of states is a history not of permanence but of change ; and in this respect, whilst they continue to be composed of human elements, the future will not differ from the past." <sup>1</sup>

Nevertheless, strange as it may seem, there has been a persistent disposition on the part of those who have laboured for the preservation of peace to overlook the natural necessity which from time to time arises for territorial readjustments.

This oversight is, for example, observable in the scheme for the prevention of wars which was ascribed by Sully to Henry the Fourth of France. "In aiming at . . . a new *status quo* which should be final, it sinned against nature. . . . The contrast between the distribution of power and of territory which he imagined, and that which actually re-

<sup>1</sup> Lorimer's *Law of Nations*, vol. ii. p. 200.

sulted from the action of the latent forces which he failed to observe, proved how little he was in a condition either to anticipate or to control the rise and fall of states. . . . In the frequent enumerations of the existing states which occur in Sully's pages, moreover, it is instructive to observe that Prussia, even in its incipient form of the Duchy of Brandenburg, is not once mentioned." <sup>1</sup>

So also, when a new arrangement of territories has been made or ratified, there has usually been an express or implied assumption on the part of the states concerned that it was intended to be permanent. "The *status quo* established at Münster, at Utrecht, at Luneville, at Vienna, at Paris, at Berlin, were all to be permanent; and as their permanence was guaranteed by the doctrine of the balance of power, it is not difficult to see how that doctrine came to be, in itself, a perpetual *casus belli*." <sup>2</sup>

It is then necessary that we should recognize the theory of the permanence of territorial arrangements as a conventional fiction and take into account fully the plain truth that changes in nations due to natural causes will continue to cause changes in the society of states. In other words, changes *de facto* in nations will in some way or other be followed by changes *de jure* in states.

Hitherto changes in territorial arrangements have for the most part been effected at the cost of war; although in modern times Congresses of the Powers and the Concert of Europe, as well as voluntary agreements, have also played a very considerable part in bringing them about.

In this connexion it is of paramount importance

<sup>1</sup> Lorimer's *Law of Nations*, vol. ii. pp. 218, 219.

<sup>2</sup> *Ibid.* p. 200.

to recognize that International Law, as we shall see hereafter, makes no adequate provision for giving effect to the operation of the natural causes from which the necessity for territorial readjustments arises. So far as it relates to the acquisition of territory, it largely consists of rules of the Civil Law applied to the relations of states. It takes no cognizance of the existence of nations or of the constant changes which they undergo and which prevent the society of states from assuming the stability of form which is in itself necessary in order that the operation of general rules may be thoroughly effective.

It may be that natural changes of the kind which we have been considering will gradually diminish in the relative magnitude of their importance. But it cannot reasonably be doubted that they will long continue to operate to such an extent that occasionally the consequent changes in the relations of states *de facto* will have to be recognized by territorial and other readjustments of their respective positions. Here then is a pregnant cause of future wars, unless the political machinery of the world be specially adapted for the purpose of preventing them.

In connexion with this cause of wars, we must take into consideration the ambition and lust of territory which from time to time characterize those who wield the power of great states. The changes which occur naturally in the relative strength and spirit of nations have too often provided the opportunity for aggression and the temptation to injustice and violence. If the relative strength of nations could have been kept



stable, the states existing at any given time might, as it were, once and for all, have fought out the question of their respective pretensions. As it has in fact been, the constant natural changes in the nations have given occasion for recurring uncertainty as to the actual distribution of might among the various states.<sup>1</sup>

Thus from time to time it has happened that some nation, on reaching a period of special racial development, with a rapidly increasing population and accumulating wealth and resources, has felt itself, whether justly or not, hampered by confinement within territorial limits which have no longer satisfied its aspirations. Under such circumstances its rulers have only too easily emancipated themselves from the ordinary restraints of moral principles. The cause of national aggrandizement has been erected into a special and, as it were, transcendental standard of right, and for this cause the political leaders of the state have become not only willing but anxious to fight. With the coming of a favourable opportunity, or the occurrence of a plausible pretext, the state has wished for war. In such a case the friendly mediation of third parties could have been only an embarrassment of a temporary character. Arbitration would have been equally inapplicable. Considerations of right having been laid aside, all has been staked upon the desire to win the national objective by conquest.

<sup>1</sup> "It is the necessity of ascertaining on each special occasion the side on which might really lies, and the possibility of the temporary triumph of ultimate weakness, that is the cause of international war" (Lorimer's *Law of Nations*, vol. ii. p. 208).



If, for example, keeping to comparatively modern times, we review the wars of Philip II of Spain, Ivan the Terrible, Louis XIV, Napoleon, William I of Prussia, or William II of Germany, we shall find that arbitration, according to any standard of right existing for the time being, and other kindred processes, could have had no application or relation to their real causes. Such monarchs, prompted by ambition and tempted by the apparent relative weakness of others, and possibly in a sense blindly following biological impulses, made war because they wanted it.

It is indeed to be constantly borne in mind, in connexion with the present subject, that among the wars of the past which it would have been difficult to prevent were those which were really due to the desires of ambitious states to try conclusions with other states, and that in the future it will still be difficult to prevent the occasional outbreak of war from similar causes.

It is, of course, the fact that the causes of particular wars have usually been complex in their nature and obscured by the pretensions and arguments of the belligerent states. Nevertheless, for the purposes of practical convenience, the causes of wars in general as between modern civilized peoples may with approximate accuracy be ranged in four classes: (1) Genuine disputes between states as to their mutual rights under the Law of Nations with regard to particular subject-matters or issues arising between them; (2) revolts of the spirit of nationality against the position of certain nations or parts of nations within certain states; (3) changes in the relative strength and territorial

requirements of states due to changes in nations ; and (4) ambitious desires on the part of the ruling classes of states or groups of states for enlarged dominions.

Having regard to the considerations indicated in the previous chapter—particularly to the colossal scale on which wars between great states, if waged at all, must henceforth be carried on ; the general disposition of mankind towards peace ; and the practice of resorting to arbitration and other consensual methods of adjusting disputes—it is reasonable to suppose that there is no longer any grave risk of war between the more advanced states from any cause coming within the first of the above classes. But, until the world is much nearer to the time of the general sway of conscience and the prevalence of goodwill than it at present is, it is equally reasonable to apprehend that wars due to causes coming within the other three of these classes will from time to time occur, unless they are prevented by some means which civilization has not hitherto adopted.

The problem is to ascertain how such means may be provided.

PROPOSITION II.—Until the world as a whole has coalesced into a universal social community, the movements of the spirit of nationality, the natural changes in the relative vigour and population of nations, and the desires of ambitious states for enlarged dominion, will, from time to time, cause wars, unless appropriate measures to prevent them are taken collectively by all states or such of them as together possess preponderant power.

## CHAPTER III

### A JURISTIC ILLUSION

**A**N adequate perception of the causes which may still lead to wars will enable us to appreciate the difficulty of the great problem as to the best means of establishing a durable peace which now confronts statesmen and jurists, and indeed all men of intelligence and goodwill.

In order that effective means of counteracting these causes may be ascertained, it is important that the principal categories of plausible suggestions which are likely to divert attention from the real points for consideration and to lead inquirers in wrong directions should, in the first place, be critically examined. When we realize that schemes which to many appear to be obvious ways of avoiding wars are at present impracticable, and that it is certain that for many generations to come they must remain only ideals, we shall be the more likely to concentrate our attention upon appropriate measures.

Many thinkers both in former ages and in our own time have advanced what may conveniently be termed a juristic solution of the problem. They have boldly contended that in the society of states

order must be established and maintained in the same way as it has already been established and is now maintained in the case of societies of individuals. The communities which we call states must in their view be rendered subject to a universal law enforced by a competent authority which must be supported by an adequate force. Some have put the suggestion in a strictly logical form, and have contemplated avowedly a *civitas maxima*—a world-state—from which *ex hypothesi* interstatal wars would be excluded. Others, feeling that this proposal was for the time being impracticable, and thinking to stop short of making it, have suggested that international law should be upheld throughout the world by an International Force charged with the function of restraining or punishing breaches of its provisions. A few illustrations of suggestions of the latter kind may conveniently be given in this place.

Rousseau, after referring to the political system of Europe as it existed in his time, urged that: "In order to substitute for this imperfect association a solid and durable confederacy, all its members must be placed in such a state of mutual dependence that no one should be able to resist all the others united, or to form separate alliances capable of resisting the general league. For this purpose it is indispensable that the confederacy should embrace all the European powers; that it should have a supreme legislature, capable of establishing general regulations for its government, and a judicial tribunal adequate to give effect to these regulations; that it should possess a coercive power capable both of restraining and compelling the action of its members; and sufficient authority to prevent any of them from



withdrawing from the union whenever caprice or interest may dictate.”<sup>1</sup>

In the *Road towards Peace*<sup>2</sup> Dr. Charles Eliot says: “Some adequate force must be behind an International Supreme Court, as it always is behind any other Court; otherwise it may be feared that the Court will not command in practice the confidence of civilized mankind.”

Similarly, in the *Principles of International Law*,<sup>3</sup> Dr. T. J. Lawrence says: “The truth is that in the last resort war is the only safeguard for what virile nations hold more dear than material prosperity—their independence, their honour, their position of influence in the world. And therefore wars will endure, till overbearing and unscrupulous states are restrained by international tribunals and a strong international police force.”

Such citations could be multiplied indefinitely.

In this connexion it must at the outset be observed that it is important that those who are called upon to form an opinion as to the merits of any proposal to establish an International Force should in the first instance be quite clear as to the character of the force intended.

An International Force may mean the regulated and co-ordinated forces of several independent states directed by these states themselves to a common end in pursuance of a treaty entered into

<sup>1</sup> See the summary given in Wheaton's *History of the Law of Nations*, p. 267, of the views expressed by Rousseau in the treatise published by him in 1761 and called *Extrait du Projet de Paix Perpetuelle de M. l'Abbé de Saint-Pierre*.” Wheaton's *History* is a work entirely distinct from his far better known treatise on *International Law*.

<sup>2</sup> P. 25.

<sup>3</sup> 4th ed. p. 575.



between them. The suggestion of the constitution of an International Force in this sense is eminently practical ; and it is considered in detail later on in this treatise in the chapter on " A League of Peace." But the expression may mean—and indeed as now used very often does mean—a Force directly controlled by an executive authority common to the society of states as a whole. Such a Force as this would more aptly be called a " Supreme Executive Force." It is with this latter conception alone that we are concerned in the present chapter.<sup>1</sup>

A world-state, a law universally obligatory, and a Supreme Executive Force, are severally aspects of one and the same political constitution. Each of the three conceptions necessarily involves the other two. Each of them, moreover, if realized, would involve the sacrifice of independence and sovereign rights by every state which now exists.<sup>2</sup>

A Supreme Executive Force, *ex vi termini*, would be capable of restraining any of the Great Powers which had been parties to its constitution. Accordingly, if its size were to be kept within moderate bounds, each of the constituent states would have to disarm, save in so far as it contributed a quota to

<sup>1</sup> In many, perhaps in most, of the writings and speeches in which an International Force is advocated, it is not clear in which of the above senses the term is intended ; or probably it would be more nearly accurate to say that those who employ this term do not, generally speaking, appreciate the fundamental distinction between the two meanings.

<sup>2</sup> Any scheme for united action may of course be limited to a certain number of existing states, or to such as from time to time should accede thereto. But most of what is true of the more comprehensive scheme is equally true, *mutatis mutandis*, of the narrower conception ; and to avoid prolixity the former will alone be considered specifically in this treatise.

the Central Force, or required a Force of its own for the preservation of internal order. Indeed, inasmuch as the maintenance of further forces than these by any constituent state would *ex hypothesi* be useless and inconsistent with the object of the maintenance of the International Force, the propriety of disarmament, except to the extent indicated, would necessarily follow from its institution.

It would of course be requisite that the Force should be wielded intelligently. Its existence would therefore involve its control by a Central Council representing the constituent states and authorized to declare their collective will.

The existence of this Council, authorized to issue mandates in the name of the entire body of states and to enforce compliance therewith by directing the Supreme Executive Force against any states which should disregard them, would cause the development of a habit of obedience to the Council on the part of the constituent states. All disputes, in the last resort, would have to be submitted to its decision.

There being no Force in existence capable of overpowering the Supreme Executive Force, the Council which controlled it would not itself be under the necessity of obeying, nor would it acquire the habit of obedience to, any authority superior to its own.

By reason of the universal tendency of mankind to follow precedents and evolve rules of conduct, the Council in issuing its decrees would inevitably establish a system of law indirectly, even if it did not in fact resort to direct legislation. The law

thus established would be binding upon all the constituent states, because they would know that, in case it were disobeyed, the Force would be ready for the purpose of compelling compliance with its provisions.

Accordingly, the Central Council would be the sovereign body of the entire world to which all the constituent states would be subject. It alone would be independent ; all other bodies and persons would be dependent upon it. The law which it enforced would be universally obligatory, except that it would not be binding upon the Council itself. This law would not be international or interstatal. It would be the public law of the one and only world-state, which would be formed by the entire body of the united communities. Every state upon entering the union would cease to be an independent political community, or, in other words, a state in the ordinary meaning of the word. Within the scope of sovereignty there can be no independence.

A coercive power compelling obedience to the decrees of the body by which it is wielded and to the system of law which it applies involves the exclusive sovereignty of this body and the operation of the law over all who are subject to the power. Conversely, sovereignty or law involves a coercive authority paramount over all who are subject to the sovereignty or bound by the law. A Supreme Executive Force involves a world-state and the cessation of the existence of all other states.

In other words, a universally operative Force, not arbitrary or unregulated but constituted by virtue of the general consent and existing for the purpose of maintaining order in human conduct,

would necessarily involve Law in accordance with the general provisions of which it was to be applied. Law necessarily involves a state coextensive with the individuals or communities subject thereto. Such a Force therefore would exclude independence on the part of any member of the state in which it prevailed.

In order to render the foregoing propositions clear it may be well to cite a few passages from the works of leading writers on jurisprudence.

“Every positive law, or every law simply and strictly so called,” says John Austin,<sup>1</sup> “is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author. Even though it sprung directly from another fountain or source, it *is* a positive law, or a law strictly so called, by the institution of that present sovereign in the character of political superior. . . . The superiority which is styled sovereignty, and the independent political society which sovereignty implies, is distinguished from other superiority, and from other society, by the following marks or characters:—1. The *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons. 2. That certain individual, or that certain body of

<sup>1</sup> *Jurisprudence*, 4th ed. vol. i. pp. 225-7.



individuals, is *not* in a habit of obedience to a determinate human superior. Laws (improperly so called) which opinion sets or imposes, may permanently affect the conduct of that certain individual or body. To express or tacit commands of other determinate parties, that certain individual or body may yield occasional submission. But there is no determinate person, or determinate aggregate of persons, to whose commands, express or tacit, that certain individual or body renders habitual obedience. Or the notions of sovereignty and independent political society may be expressed concisely thus:—If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent. To that determinate superior, the other members of the society are *subject*. . . . The mutual relation which subsists between that superior and them may be styled *the relation of sovereign and subject*, or *the relation of sovereignty and subjection*."

The theory thus expounded by Austin has been the subject during the last half-century of many weighty criticisms; but none of these materially lessen the value of the exposition in connexion with the present subject. This is apparent from the following citations from an essay in which Lord Bryce, after taking these criticisms into account, propounds his own deliberate conclusions upon the subject.

"The term Sovereignty is used in two senses, Legal Supremacy and Practical Mastery. Legal



Sovereignty exists in the sphere of Law: it belongs to him who can demand obedience as of Right. Practical Sovereignty exists in the sphere of Fact: it is the power which receives and can by the strong arm enforce obedience. The Legal Sovereign in any State is ascertained by determining the Person (or Body) to whom the law assigns in the last resort the right of issuing general rules or special orders, or of doing acts without incurring liability therefor. The Practical Sovereign is determined by ascertaining who is the Person (or Body) whose will in the last resort prevails (or in case of conflict will be likely to prevail) against all other wills. . . . Practical Sovereignty is, by definition, incapable of being limited (for Law has nothing to do with it), though the exercise of it by its possessor may be restrained by the fear of consequences. . . . Practical Mastery usually ripens, after a certain time, into Legal Authority.”<sup>1</sup>

“A law,” says Professor Holland, “in the sense in which that term is employed in Jurisprudence, is enforced by a sovereign political authority. It is thus distinguished not only from all rules which, like the principles of morality and the so-called laws of honour and of fashion, are enforced by an indeterminate authority, but also from all rules enforced by a determinate authority which is either, on the one hand, superhuman, or, on the other hand, politically subordinate.”<sup>2</sup> “It is by the sovereign, be that sovereign one individual or the aggregate of many individuals, that all law

<sup>1</sup> *Studies in History and Jurisprudence*, vol. ii. pp. 69-72.

<sup>2</sup> Holland's *Jurisprudence*, 11th ed. p. 43.

is enforced. . . . Apart from the existence of a State, and of a sovereign power within it, there can be no law, because all laws are rules enforced by such a power. . . . It is convenient to recognize as laws only such rules as can reckon on the support of a sovereign political authority; although there are states of society in which it is difficult to ascertain as a fact what rules answer to this description.”<sup>1</sup> “The most obvious characteristic of law is that it is coercive.”<sup>2</sup>

It should then be clearly understood that the advantages of positive law and judicial justice enforced by a common executive authority cannot be secured by either individuals or states except at the cost of their subjection to that authority.

The constitution of a world-state would involve not only the surrender by each of the constituent states of the right of making war but also the obligation of full obedience on their part to all the decrees of the Supreme Common Council.

Among the necessary consequences of the general surrender of independence would be the disintegration of the great empires. Such a surrender in the case of the British Commonwealth, for example, would involve an immediate weakening of the ties which now bind its different dominions together, and ultimately no doubt its dissolution into the various communities which had previously formed its component parts. For if, to take an illustrative case, Great Britain had no right or power to join with Australia in protecting that dominion against extraneous force,

<sup>1</sup> Holland's *Jurisprudence*, 11th ed. pp. 51-4.

<sup>2</sup> *Ibid.* p. 78.

and if Australians were obliged to look to the Central Council as the sole authority by which their rights could be decided or their interests maintained, it is difficult to see what community of interest, or even of sentiment, could in the long run keep Australia connected with Great Britain in any special political sense.

It would, indeed, be a condition precedent to the creation of a world-state—a new governing structure with supreme authority over the whole of the seventeen hundred millions of mankind—that the government which at present controls the common concerns of a quarter of those millions should cease to exist. It would be a condition subsequent to the creation of the new authority that the British Commonwealth of Nations should be resolved into its constituent communities. In other words, in order that the new world-force should be established, it would be necessary that the principal force which has hitherto existed for the maintenance of order should be dissolved into the elements from which it has been developed by the labours and sacrifices of ages.

It is reasonably certain that Britain would not be prepared to take any step calculated to lead to consequences of this kind, and indeed that none of the Great Powers would be willing to enter into any arrangement involving the sacrifice of their independent authority. Nevertheless, it may be worth while to point out that, even if it were otherwise and the statesmen and peoples of these Powers were generally disposed to co-operate in the creation of a world-state, it would still be impracticable to render such a community stable

and permanent or its central government adequately efficient and influential.

A state, as we have seen, may comprise several nations ; and a large proportion of its population may be alien from the governing race or races. But, although a state is in a sense an artificial entity, it cannot endure for any lengthened period, unless it is supported by the operation of natural causes among its citizens. Its cohesion is dependent upon community of sentiment and interest on the part of its people, or at least of a predominant section of them. This community generally depends upon some or all of the usual features of a common nationality — common blood, language, religion, customs, and traditions. In some stages of society it may mainly depend upon a common interest in combining for the purposes of defence against external enemies ; and even at the present time this kind of interest is still potent in binding together the constituent communities of great political unions. Without, however, some such strong and enduring basis of common feeling, no aggregate of individuals could evolve and maintain a government capable of exercising effective control over their conduct and strong enough to overwhelm any opposition to its authority. They could not establish the conditions necessary to the maintenance of general order. They could not avert that speedy dissolution of their collective existence which would be the inevitable consequence of its want of the essential elements of social cohesion.

In order that a world-state should attain a condition of stable equilibrium, it would be necessary that the constituent communities generally should



be satisfied with the governmental structure and that the governing body should be capable of exercising a restraining authority throughout every quarter of the globe. Neither of these conditions could exist without a far greater community of sympathy and sense of homogeneity and brotherhood than now exist between the various peoples of the world. Loyalty to the human race as a whole is still lukewarm in almost all hearts as compared with loyalty to the nation and the state. Centuries of closer intercourse and broader education must pass away before the divers nations will have sufficient mental and moral affinity with one another to render practicable their coalescence into a great community with a collective civil life. Meanwhile the negative interest in the prevention of war, even if, for the time being, it furnished a sufficient motive for the constitution of a united state, would tend to diminish in strength as the period of peace lengthened and the horrors of war receded into the distance of the past. A nominal political unity would not prevent dissension. Nor would the armed strife of nations be any the less odious than before because lawyers might choose to describe it as rebellion or civil war.

It will, indeed, probably be generally admitted that it is for the time being quite impossible to create a world-state. The points which it is really necessary to emphasize are, that any attempt to create by direct means a Supreme Executive Power for the purpose of enforcing International Law would be predestined to failure because the creation of such a Power would involve that of a world-state; and that the attempt, if seriously



made on an extensive scale, would in itself be disastrous.

Such an attempt, though it would be impotent to create, would be effective to destroy. It would tend to lessen the power and influence of the most advanced states without any compensating advantage. It would weaken the ties of allegiance which now exist between the citizens of widespread dominions. Instead of creating a world community, it would tend to the dissolution of the larger social aggregates which now exist. Above all, it would tend to the disintegration of the British Empire, which hitherto has been the main pillar of such order as has existed throughout the world in modern times.

We ought, however, to bear in mind that, although Sovereignty, Law, and Independence are the objects of definite conceptions, they are not in fact absolutely realized in human affairs. They are, indeed, essentially matters of degree. It is generally possible to decide with confidence whether or not a particular power is sovereign or a certain general proposition is a law; but in some cases it is otherwise. And new adjustments of interstate relations, involving developments in the direction of a common sovereignty, or a universal law, may become desirable in the near future. It is sufficient here to urge that, for the time being, an attempt to approach so closely to the constitution of a world-state as to render the power of a Central Council more conspicuous and certain than the freedom of action of the Great Powers respectively, would be more likely to prove disastrous than beneficial. So long, however, as it is recognized that the conception of a world-state, or even of a Supreme Executive Force,

for the purpose of upholding a universally obligatory system of law, cannot for the present be realized by direct means, the idea itself may be useful as suggesting schemes which may be established immediately, or as presenting to the mind a far distant objective, the contemplation of which may help us to move onward in the right direction.

PROPOSITION III.—No method of preserving peace which would involve the existence of a common and plenary sovereignty over the Great Powers is at present practicable.

## CHAPTER IV

### THE FEDERAL DILEMMA

**M**OST of the schemes for the preservation of peace which have attracted widespread attention during the last few centuries have involved in some form or other the suggestion of a federation of states with the immediate object of preventing wars. This suggestion will, moreover, in the near future probably occupy a larger place than ever in the consideration of thoughtful people. It is, accordingly, of primary importance to have clear views with regard to the nature of the federation contemplated in this connexion.

Federation may mean a union of one or other of two radically different kinds.

In the proper and more usual sense of the word it means a combination of several states into one, the sovereignty of which is shared by a Central Government with the Governments of the communities which have become united therein. The federated states irrevocably cease to be respectively independent political communities. Thenceforth they are constituent parts of one sovereign state, to the Central Government of which is confided the conduct of all their external relations. The union of the North American Colonies,

which became the United States of America, was a federation of this character.

In the other sense of the word, federation means a treaty of alliance for a particular object or objects which is intended to be permanent ; as the result of which the contracting states, while severally retaining their independence and sovereignty, are thenceforth regarded as a permanent confederacy of states.

This distinction between the two meanings of the word " federation " corresponds to that which is drawn by Austin in the following passage between a " composite state " and a " system of confederated states."

" In the case of a *composite state*, the several united societies are one independent society, or are severally subject to one sovereign body, which, through its minister the general government, and through its members and ministers the several united governments, is habitually and generally obeyed in each of the united societies, and also in the larger society arising from the union of all. In the case of a *system of confederated states*, the several compacted societies are not one society, and are not subject to a common sovereign ; or (changing the phrase) each of the several societies is an independent political society, and each of their several governments is properly sovereign or supreme. Though the aggregate of the several governments was the framer of the federal compact, and may subsequently pass resolutions concerning the entire confederacy, neither the terms of that compact nor such subsequent resolutions are enforced in any of the societies by the authority



of that aggregate body. To each of the confederated governments, those terms and resolutions are merely articles of agreement which it spontaneously adopts ; and they owe their legal effect, in its own political society, to laws and other commands which it makes or fashions upon them, and which, of its own authority, it addresses to its own subjects. In short, a system of confederated states is not essentially different from a number of independent governments connected by an ordinary alliance. And where independent governments are connected by an ordinary alliance, none of the allied governments is subject to the allied governments considered as an aggregate body : though each of the allied governments adopts the terms of the alliance, and commonly enforces those terms, by laws and commands of its own, in its own independent community. Indeed, a system of confederated states, and a number of independent governments connected by an ordinary alliance, cannot be distinguished precisely through general or abstract expressions. So long as we abide in general expressions, we can only affirm, generally and vaguely, that the compact of the former is intended to be permanent, whilst the alliance of the latter is commonly intended to be temporary ; and that the ends or purposes which are embraced by the compact are commonly more numerous, and are commonly more complicated, than those which the alliance contemplates.”<sup>1</sup>

There is thus an essential distinction which it is necessary for the present purpose to keep constantly in mind. Federation in the one sense

<sup>1</sup> Austin's *Jurisprudence*, 4th ed. vol. i. pp. 268-9.



involves the creation of a Central Government empowered to enforce the sovereign will of the entire community against any particular constituent part, and also the absence of any right on the part of the constituent communities to withdraw from the composite state. Federation in the other sense does not involve the creation of any such Central Government ; it leaves the confederated states in point of sovereignty and independence in the same position as they occupied before. Apart from moral and other incidental effects, its essential result in this case is merely that each of the several allied states is bound by its agreement to a certain course of conduct.

Federation, in the first of the foregoing meanings, applied to the society of states as a whole, would obviously involve the creation of a world-state, which we have seen is, for the time being, impracticable. And it is this kind of union which is really involved in many—probably in most—of the schemes in which federation has been proposed as a means of maintaining peace ; although, generally speaking, the authors of these schemes do not appear to have appreciated this fact. Certainly they do not, for the most part, seem to have contemplated the obliteration of the international personality or sovereignty of the several states which the formation of a world-state would involve.

As an instance of proposals of federation in the other meaning of the word, reference may be made to the following passages in Kant's essay on *Perpetual Peace*.

His "Second Definitive Article of Perpetual Peace" is : "The law of nations shall be founded

on a federation of free states." "Every state," he says, "for the sake of its own security, may—and ought to—demand that its neighbour should submit itself to conditions similar to those of the civil society where the right of every individual is guaranteed. This would give rise to a federation of nations which, however, would not have to be a state of nations. That would involve a contradiction. For the term 'state' implies the relation of one who rules to those who obey—that is to say, of lawgiver to the subject people; and many nations in one state would constitute only one nation, which contradicts our hypothesis, since here we have to consider the right of one nation against another, in so far as they are so many separate states and are not to be fused into one." <sup>1</sup> "Instead of the positive idea of a world-republic, if all is not to be lost, only the negative substitute for it, a federation averting war, maintaining its ground, and ever extending over the world, may stop the current of this tendency to war and shrinking from the control of law. But even then there will be a constant danger that this propensity may break out." <sup>2</sup> And, in an appendix to the essay, he says: "We have seen above that something of the nature of a federation between nations, for the sole purpose of doing away with war, is the only rightful condition of things reconcilable with their individual freedom." <sup>3</sup>

Now, in regard to a federation of the kind thus proposed by Kant, it is to be observed that it would

<sup>1</sup> *Perpetual Peace*, translated by Miss M. Campbell Smith, pp. 128, 129.

<sup>2</sup> *Ibid.* p. 136.

<sup>3</sup> *Ibid.* pp. 192-3.

leave the measures to be taken for the prevention of war to the several independent states acting in accordance with their obligations under the treaty which had been entered into between them. But it would seem that the formation of such a federation might be accomplished in the immediate future, and it is by no means clear that it would be ineffective. It will, accordingly, be considered later on in this treatise in the chapter on "A League of Peace."

In reviewing, therefore, any suggested scheme of federation, it will be convenient to examine it in the light of the distinction which has thus been indicated. If, and in so far as, the scheme involves the creation of a world-state, it is, for the present, impracticable. On the other hand, if it does not involve this, its real scope is somewhat obscured by the use of the word "federation." For in this case it does not provide for any new executive authority common to the several states concerned ; and its strength or weakness will depend upon the degree in which it is calculated to bring about a sufficient solidarity of opinion and co-operation in active measures on their part to prevent or terminate any breaches of the peace.

PROPOSITION IV.—Peace can be forcibly maintained only by means of the co-operation of states as separate political entities.

## CHAPTER V

### THE FOUNDATIONS OF PEACE

**W**ITHIN the borders of every civilized community order is for the most part maintained. Any tendencies on the part of the citizens to crime, anarchy, or civil war are restrained within comparatively narrow limits. But the world has yet to establish permanent order between civilized communities themselves.

We have seen that it is not practicable to secure a lasting peace by setting up in the society of states the machinery of sovereignty and positive law. Accordingly, there is in reality no simple and obvious means of ensuring the attainment of the desired object. The recognition of this negative truth is of the greatest practical importance. Without it one can hardly be in a position to appreciate the gravity of the difficulties which beset the problem before us or likely to discover its solution. On the other hand, when once we have appreciated the position as it really is, we shall see that it calls for patient and laborious study as well as for the motive power of ardent enthusiasm.

Beginning, then, as it were, *de novo*, we must carefully inquire into each and all of the means which are, or may be, available for the purpose of preventing wars.



States are great corporations of which the members are human beings. Accordingly, the action of states is determined by motives which are either the same as, or analogous to, those which determine the conduct of individual men. In order, therefore, to ascertain fully "the things which make for peace" between states, we must in the first place review the means whereby the conduct of individuals is guided and controlled.

We must at the outset distinguish between influences which operate in the formation of character and influences which directly regulate conduct. It is clear that everything which tends to establish in anyone a good disposition—to quicken conscience and to develop a virtuous character—is indirectly of paramount importance in relation to his conduct. Everything which tends to make an individual good must tend also to cause his conduct to be right. Accordingly, all that is comprised in education in the most comprehensive sense, and especially the general tone of the community in which the citizen is reared, indirectly affect his conduct. The ultimate desideratum, indeed, is that men should be brought into such a moral condition that they would do right habitually and without difficulty or even conscious effort.

By the elevation of individuals the nations and states to which they belong are themselves elevated. Everything which improves the moral character of the citizens tends to produce the righteousness which "exalteth a nation" and to increase the probability that the actions of their government will be right. In a state the citizens of which were good men the ruling powers would



not be likely to wage a war which was manifestly unjust. Accordingly, we ought to recognize fully and clearly the supremely important truth that every one who, in any part of the world and by any means whatever, is working for the moral advancement of mankind, is at the same time promoting goodwill among the nations and the cause of peace throughout the society of states. The good disposition is a peaceable disposition, and is, as it were, the main element in the foundations of permanent peace.

Spiritual and temporal welfare are also among the conditions which predispose mankind to peace. Other things being equal, a happy and contented being is less prone to stir up strife than one whose life is passed in an attitude of revolt against his own environment. And so the disposition of the citizens of a particular community towards the *status quo* of their corporate existence has an important bearing upon the external influence of their state. A community which is dissatisfied and restless, or which is frequently or for any long period torn by internal dissensions, is apt to be the cause of disturbance of the peace outside its own borders.

In order that the citizens of a particular state may be in a condition of contentment and orderly stability, the state must fulfil its true function as the organ of the corporate unity of the people, whereby they are enabled to realize fully their social and collective life. The spirit of nationality must breathe freely within the political structure of the community, and the system of government must be acceptable to the citizens at large.

If part of a nation comprised within one state

desire political union with the rest of their race who are in allegiance with another, there will be a tendency to instability in the relations of the two states immediately concerned which may result in a disturbance of the equilibrium of the society of states itself. So, if a nation, or part of a nation, feel oppressed by the domination of another race, or for any other reason feel that their national life is out of harmony with their political position and are anxious to escape from their civic allegiance, a similar disturbance will be probable. Civil war may easily lead to international complications. War indeed in any form is a fiery evil which tends to spread so long as it remains unextinguished.

Wherever, therefore, the spirit of nationality is in revolt against the existing political order the disposition for peace must be imperfect. It is accordingly pre-eminently important that, in the settlements of territorial boundaries, whenever the opportunity offers, regard should be paid to nationality so far as it is a potent reality. Public right can obtain full and lasting recognition only upon the condition of its substantial correspondence with the real sentiments of the living nations.

The form of the government of a state has moreover an important bearing upon its external influence, apart from the question of the general acquiescence of the citizens in its existence.

Self-respect and a sense of responsibility on the part of an individual are among the best securities for the goodness of his intentions; while a habit of rational reflection upon questions of difficulty and importance affords the most reliable ground for confidence in the wisdom of his actions. In a state

where representative government prevails there is the amplest scope for the development in the citizens both individually and collectively of an enlightened and comprehensive respect both for themselves and for their country. The sense of responsibility also for the actions of their government in relation to other states must almost inevitably exist in more or less amplitude and vigour throughout the electorate. The people as a whole, moreover, naturally take an intelligent and sustained interest in the public affairs of their state ; they become accustomed to weigh disputed questions according to the standards of justice and expediency ; and they acquire the habit of acquiescing in the decision of disputed issues according to the reason and conscience of majorities. The executive government itself is responsible to them and must carry their approval with it whenever it embarks upon a course of action of grave importance to the community. The necessity for this approval is a check upon foolish and unrighteous wars, the efficacy and value of which must of course largely depend upon the intelligence and integrity of the people at large. In the case, however, of a democratic state the danger of the personal ambitions or idiosyncrasies of individuals involving the community in hostilities must necessarily be considerably less than that which exists in the case of empires and kingdoms which are governed autocratically. Accordingly, there is solid ground for believing that the extension of representative institutions will on the whole be favourable to the cause of peace.

A good disposition leads to results of practical beneficence in proportion to the scope of the sym-

pathies by which its activities are directed. Sympathy is evoked by social intercourse. Even the most casual conversation between strangers generally disposes both to reciprocal civility. The social instincts of the race have in fact long been dominant among civilized men. Friendship necessarily tends to exclude strife. But it is of practical importance to realize also that the mere fact of acquaintance resulting from social intercourse of any kind in itself generally has the effect of disposing men to mutual consideration and goodwill.

Everything, therefore, which tends to the development of a sympathetic attitude on the part of the citizens of the several states towards those of others will contribute to the establishment of lasting peace. The various agencies whereby the different peoples are brought into communication with one another will in their several ways tend to the promotion of general goodwill. Especially will this be the case in so far as common interests are developed. Conferences of workmen, savants, artists, or others, from divers countries, will in effect generally be peace conferences. Even purely business relations, though susceptible of misuse, will in the main have a tendency in the right direction ; for the trader has usually a sympathetic interest in the well-being and prosperity of his customers.

The operative effect of the various means of laying the foundations for the establishment of the conditions favourable to the maintenance of general peace, which we have thus briefly indicated, must necessarily be realized only gradually. We cannot reasonably expect that these means by themselves will be adequate for the prevention of



war until many future generations of men shall have passed away from the earth. Meanwhile the preservation of peace is the most pressing of all the needs of mankind. Accordingly, it is not sufficient for our purpose to recognize and observe the principles and methods prescribed by reason for the promotion of the moral health and social welfare of the various nations and states. We must at the same time endeavour to discover and apply specific remedies for the occasional tendency to strife to which they are still subject and which is in itself in the nature of a dangerous disorder of their systems.

With a view, therefore, to the attainment of the best possible results in the immediate future, we must concentrate our attention upon the external influences by which, in the world as it now is, conduct may be regulated directly.

PROPOSITION V.—States will be inclined to a peaceable disposition by the moral elevation of their citizens; the correspondence of national sentiment with political allegiance; the existence of representative government; and the prevalence of social relations between the various peoples.



## CHAPTER VI

### THE REGULATION OF CONDUCT

**W**ITH the object of ascertaining the means which are available for the control of the conduct of states, we must now review the various ways in which the conduct of individual men is regulated.

Human beings in general are restrained from wrongful aggression upon their neighbours, and constrained to action necessary for the collective welfare of the society to which they belong, by the operation upon their minds of certain forces or influences which may be distinguished as follows : (1) Extraneous Physical Force ; (2) Administrative (or Arbitrary) Authority ; (3) Sacerdotal Authority ; (4) Custom ; (5) Convention ; (6) Positive Law ; (7) the Social Imperative ; and (8) Public Opinion.

Whenever an individual, not wholly in deference to his own conscience, refrains from doing anything to which his immediate view of his interest, or his passion, inclines him ; or does that from which, owing to the operation of similar motives, he feels averse, or which he would not do merely for the purpose of gratifying any immediate selfish desire on his own part, it is to one or more of these forces or influences that he defers.

Throughout the historical period all these sources of authority have to a greater or less extent prevailed among men and have assisted the race in its general moral development; but their relative importance has varied from time to time. Hitherto it would seem that they have all been, as it were, necessary concomitants of the social organizations of mankind, and as yet there is no immediate prospect that any of them will cease to be operative. Accordingly, it will be convenient for the purpose of this treatise to define them severally, and then to proceed to the consideration of their practical bearing upon the problem in hand.

### EXTRANEOUS FORCE

Every man is influenced by the existence of the physical force residing in other people. This influence operates independently of the existence of any relationship to which authority or the right of control is attached by law or custom or otherwise, or any reciprocal obligations arising out of common membership of a particular community. It operates as between all men who come into contact with one another, irrespectively of the time or place or other circumstances of the case.

The demeanour of the rudest savage on meeting other people, whether members of his own tribe or not; would, generally speaking, be regulated to a certain extent by his view of their efficiency as compared with his own in a possible combat. However fierce in disposition and prone to violence he might be, he would be slow to indulge in wanton and open aggression upon a party obviously superior

to himself in fighting strength. Less crudely and directly, but none the less certainly, the most valiant and polite gentleman in Christendom is influenced by the physical power of others. It constitutes a standing warning against exploits of a quixotic character. The conduct of a sane man, indeed, so long as he is not absolutely deprived of good sense by anger, will always be qualified and limited by a perception of the futility of attempting the impossible, and the undesirability of provoking a contest in which his own defeat would be certain. At the same time, it is of course true that, while the savage and the criminal find in their appreciation of the force possessed by others a restraint upon cruel or predatory instincts which operates upon their minds directly, the well-disposed citizen, although habitually influenced by the fact of the existence of this force, does not, generally speaking, consciously advert to it.

Accordingly, in the rudest society some sort of temporary equilibrium is from time to time obtained by virtue of the general recognition of this force. And in the most advanced civilization conduct is still regulated—manners are softened and provocative demeanour is prevented—by its ever present though usually quiescent power.

#### ADMINISTRATIVE AUTHORITY

Administrative authority, in this connexion, means the authority exercised by a superior over an inferior in so far as it is not limited to the mere enforcement of a pre-existing general rule. It is the discretionary control exercised by one person

over another as between whom and himself there exists a definite relation of superiority and inferiority. The power of issuing commands supported by a sufficient sanction (or prospective punishment in case of disobedience) resides in a person or body, legally or practically recognized as a constituted authority by the person who is subject thereto. The exercise of this power is arbitrary in the sense that it consists of particular commands of which the provisions are dependent, within the limits, if any, of the scope of the authority, upon the discretion of those by whom they are issued.

In this category a vast area of human relations is comprised. It ranges from parental authority to the autocracy of an absolute monarch. It includes the power of the chieftain of a savage tribe as well as the sovereign authority of a democratic state. It also includes all discretionary authority residing in persons who are themselves subject to the law of their land or responsible to an authority higher than their own. It therefore comprises the more salient and pervading aspects of the authority exercised even in republics and constitutional states, within the limits allowed to their discretion, by preceptors, masters, managers, naval and military officers, skippers, prison officials and the like, as well as the authority exercised by persons or bodies acting in pursuance of limited administrative powers.

The point of importance in this connexion is the large part which is taken by central and local administrative authorities in the affairs of all settled communities.

The existence of a state involves on the part of



the government not only the adoption or enactment of laws or general rules of conduct (which will be considered hereafter) and their enforcement, but also the issue and enforcement of occasional or particular commands, by which specific acts or forbearances are required from some or all of its citizens. General rules are the means by which the conduct of human beings is regulated so far as acts or forbearances of any predetermined class are required at their hands. But the people who collectively constitute the natural substratum of the state, whether considered individually or together, are living organisms, and as such their mutual relations and their needs are continually changing. These dynamic conditions give rise to the necessity for governmental ordinances *ad hoc*. It is impracticable to govern satisfactorily any community by general rules alone. Exigencies due to the actions and reactions of the living social organism upon its environment and which cannot be subsumed to general rules are continually recurring. In such cases the collective will—the will of the governing authority—must be exercised in administrative action.

Accordingly, the social life of a community cannot be carried on in reliance merely upon laws, police, judges, sheriffs, and prisons. The commands or particular orders of governors or governing bodies are as necessary as the laws established by custom or the legislature. Ministers are as essential to the commonwealth as judges. Administration is as necessary as a system of judicature. All this indeed is implied by the very word *government*.

Broadly speaking, it may be said that, as civiliza-

tion advances and the conditions of the national life become more settled, the greater are the number of categories of the civic life which can be subjected to general rules and the wider accordingly is the area in which general rules prevail. Moreover, a good constitution will provide suitable means for the restraint of those who exercise administrative power from its abuse. But the fact remains that, concurrently with the reign of law, there exists the necessity for the edicts of administrative authority. Some persons or bodies must govern. Power which is arbitrary in the sense of not being restricted in its exercise to the application of a rule to certain facts—power which within limits, however narrow, can be exercised according to a discretionary choice—is essential to human society in its present state. So long as any government whatever is necessary, there will always be some scope—however restricted—for purely administrative orders.

The tripartite distribution of sovereign powers into (1) Legislative, (2) Administrative, and (3) Executive, although its essential accuracy should be obvious, is, as a matter of fact, very generally overlooked by both jurists and laymen in this country. It is important to appreciate the reasons for this.

In Britain and other parts of the world mainly peopled by men of British descent, owing to the facts that for a long time internal order has been prevalent and the reign of law fully established, the area of arbitrary authority, other than that of the supreme legislature, has been reduced within certain definite limits. The citizens have for generations enjoyed the right of testing the validity

of almost any act of an administrative authority affecting their own interests by instituting proceedings in the ordinary courts of justice. Thus the action of the central government, as well as that of local administrative authorities, has been restrained by the application of general provisions of the law. So far indeed has this process tended to exclude from official action any appearance of oppression that, under the conditions prevalent in times of peace and apart from any sudden and grave emergency, an adult civilian hardly recognizes the true character of the administrative orders with which he is obliged to comply, except, perhaps, in matters of comparatively trivial importance.

The real activity of administrative authority in Great Britain is moreover to a large extent obscured by the powers and methods of the Imperial Parliament. This body is not only the legislature but the supreme administrative authority as well. It can in fact do whatever it pleases. So long as it observes the forms prescribed for the time being for its own enactments, it is completely free from legal restraints. When it arrives at a determination, and expresses its will according to those forms, it enacts a statute of the realm. It is not surprising that people do not distinguish between the nature of one statute and that of another. In current phraseology whatever Parliament enacts is the law of the land. In the widest meaning, however, in which the word "law" has any definite relation to conduct it always signifies a general rule. And if we examine any volume of the statutes we shall discover that the bulk of the contents does not consist of enactments which are wholly of the

nature of laws but of statutes which either wholly or partly are of the nature of occasional or particular commands. Acts of Parliament, indeed, are very largely a form of administration—the means by which, on the motion of administrative officials, the will of the community is applied to the needs for the time being of the commonwealth as a living and ever-changing organism. They are ordinances which are requisite in the interests of the state so far as these cannot be defined in standing propositions of a generic character.

The co-ordinate and equal importance of administration in relation to law is further manifest when we survey the various offices of state and the local governing authorities. If society required only laws or general rules and an executive to enforce them, there would be comparatively little reason for the existence of most of the ministries or departments of government, and the vast number of local bodies which are engaged in administrative work. It is true that, in the form of by-laws and other regulations, these authorities frame orders which consist of general rules and are therefore laws; but the making of such regulations is by no means the main part of their business. Even if we exclude from our consideration in this connexion the departments concerned with the foreign relations of the Empire, or with its defence or fiscal necessities, we shall find that the work of other ministries, for example the Local Government Board, the Boards of Trade, Education, and Agriculture, as well as that of the county, borough, and other local authorities, is mainly concerned with administration. No ordinance of any of these



bodies may contravene the provisions of the law. But this qualification does not in any way exclude the exercise of discretion within the prescribed limits, or prevent such an ordinance from being in its nature a particular command or act of administration.

What has been said of a state applies *mutatis mutandis* to any society. The governing body or person, through whom the collective will or authority is declared or exercised—whether the council of a college, the board of directors of a trading company, the committee of a club, or the head of a family—must formulate and uphold general rules. But the needs of the society will render it also imperative that administrative orders—occasional commands adapted to special states of fact—should also from time to time be issued.

*We shall hereafter see that the distinction which we have thus endeavoured to enforce lies at the very root of the momentous problem with which this treatise is concerned.*

#### SACERDOTAL AUTHORITY

Where a man shapes his conduct in a particular way in deference to what he is informed by a fellow-creature is the will of a supernatural being he yields to an authority which may be called sacerdotal.

This kind of authority differs from administrative authority, as described above, in so far as obedience thereto is constrained by the belief in the supernatural sanction and not by the power actually residing in the functionary who professes to declare the supernatural will. Similarly it differs from the authority of conscience and of religion (in the more

usual meaning of this word at the present time) in so far as obedience is yielded by reason of the fear of its sanction and not simply because of the belief in the righteousness of the particular course of action which is directed. It is, however, obvious that, although in essential characteristics these kinds of authority or influences are quite distinct, there is in fact much intermingling of them in practice.

The word "sacerdotal" is adopted in this connexion as the most convenient for the purpose. But it will be remembered that the king or chieftain was in early times himself the priest. Moreover, authority which is essentially of the character of that now under consideration has often been and still is exercised by individuals not invested with either the royal or the priestly character.

"The earliest notions," says Sir Henry Maine,<sup>1</sup> "connected with the conception, now so fully developed, of a law or rule of life, are those contained in the Homeric words 'Themis' and 'Themistes.' . . . When a king decided a dispute by a sentence, the judgment was assumed to be the result of direct inspiration. The divine agent, suggesting judicial awards to kings or to gods, the greatest of kings, was *Themis*. . . . Themistes . . . are the awards themselves divinely dictated to the judge. . . . They are separate, isolated judgments."

Similarly, Spencer says : <sup>2</sup> "There come methods by which the will of the ancestor, or the dead chief, or the derived deity, is sought ; and the reply given, usually referring to a particular occasion, originates

<sup>1</sup> *Ancient Law* (Sir F. Pollock's ed.), pp. 3, 4.

<sup>2</sup> *Principles of Sociology*, vol. ii. p. 515.

in some cases a precedent, from which there results a law."

In the Roman state, to refer to one leading illustration, this authority was long habitually exercised by the college of augurs. The tendency to seek for oracular utterances and to defer to them has indeed been a very general incident of human nature in the past.

The kind of authority now under consideration is still exercised throughout the largest ecclesiastical organizations in Christendom, as well as to some extent in other religious communities. No doubt there are many people who are entirely free from its influence, or at least believe that they are. On the other hand, there are probably many who defer to this authority without recognizing its true character.

### CUSTOM

Whenever anyone acts, or forbears from acting, in a certain way because he wishes to comply with a usage established among the people with whom he is living, he defers to the authority of custom. In so far as he exercises a conscious election in the matter, he is influenced by the desire to avoid the disapproval of his fellows, which he apprehends would ensue upon a departure from the course prescribed by general usage.

Custom differs from the foregoing kinds of authority inasmuch as it enforces a general rule of conduct, as distinguished from a particular or occasional command. It differs from law in the nature of its sanction: it is not enforced by a definitely prescribed penalty imposed by a deter-

minate human superior. There is room for vagueness and uncertainty, both as to the character of the evil consequences, if any, which will follow upon disobedience to the rule, and also as to the persons by whom they will be inflicted. Where the sanction becomes definite and the person or body at whose hands it will be suffered becomes determinate, the rule of custom is transmuted into a rule of law. This change is effected whenever a custom is recognized and enforced by the tribunals of a state.

The propensity to evolve, and afterwards follow, customs is universal; and human life cannot be imagined as subsisting in complete independence of this kind of authority. It is traceable wherever any record of society exists. Indeed, it would be difficult to say whether the ignorant savage or the civilized citizen is the more thoroughly under its control.

The growth of custom is thus explained by Professor Holland:<sup>1</sup> "Its chief characteristic is that it is a generally observed course of conduct. No one was ever consciously present at the commencement of such a course of conduct, but we can hardly doubt that it originated generally in the conscious choice of the more convenient of two acts, though sometimes doubtless in the accidental adoption of one of two indifferent alternatives; the choice in either case having been either deliberately or accidentally repeated till it ripened into habit. The best illustration of the formation of such habitual courses of action is the mode in which a path is formed across a common. One man crosses the common, in the direction which is suggested either by the purpose he has in view, or by mere accident. If others

<sup>1</sup> *Jurisprudence*, 11th ed. pp. 57-8.



follow in the same track, which they are likely to do after it has once been trodden, a path is made. Before a custom is formed there is no juristic reason for its taking one direction rather than another, though doubtless there was some ground of expediency, of religious scruple, or of accidental suggestion. A habitual course of action once formed gathers strength and sanctity every year. It is a course of action which every one is accustomed to see followed : it is generally believed to be salutary, and any deviation from it is felt to be abnormal, immoral. It has never been enjoined by the organized authority of the state, but it has been unquestioningly obeyed by the individuals of which the state is composed. There can in fact be no doubt that customary rules existed among peoples long before nations or states had come into being."

#### CONVENTION

Whenever a man acts, or forbears from acting, in a certain way because he conceives that he is bound to such action or forbearance by virtue of an agreement, express or implied, to which he has been a party, he defers to the authority of convention.

Agreements are for the most part upheld by one or more of the other kinds of authority which are now under review, and it may accordingly be contended with much force that convention is not in itself an independent category of authority.

Apparently, however, human nature, even in its rudest form, perceives some constraining influence—some independent source of authority—in an agreement as such. "*Pactum serva*" has been felt

to be an obligatory principle, not only by the citizens of highly civilized states, but generally speaking by all good people throughout historic times. The evolution of order has in fact been largely due to agreements. Grotius, indeed, says: "Since it is conformable to Natural Law to observe compacts (for some mode of obliging themselves was necessary among men and no other natural mode could be imagined) Civil Rights were derived from this source, mutual compact."<sup>1</sup>

The very fact of the making of an agreement involves the assumption that an accepted promise is the basis of an obligation. "This obligation depends upon the expectations which we knowingly and voluntarily excite."<sup>2</sup> The man who could make an agreement without any appreciation whatever of a consequent *primâ facie* reason for keeping it would be morally insane.

It is accordingly not only convenient but probably not altogether unsound logically to treat convention in the way here adopted.

### POSITIVE LAW

When a man acts, or refrains from acting, in a certain way in obedience to a rule, compliance with which is enforceable by functionaries whose proceedings are in the last resort supported by the supreme central authority of the community of which he is a member (or to which for the time being he owes allegiance), he defers to the authority of positive law.

<sup>1</sup> *De Jure Belli et Pacis*, Prolegomena 15 (Whewell's translation).

<sup>2</sup> Paley's *Moral Philosophy*, bk. iii. pt. i. ch. v. ii.

The word "law" is used with divers meanings. But it is convenient that, when the regulation of human conduct is dealt with, this word, if unaccompanied by any qualifying epithet, should be used only to signify positive law as above described. This is the sense in which the word is employed by writers on Jurisprudence and for the most part also by practising lawyers. In this sense, moreover, law is distinguished satisfactorily from the other influences which have to be considered. On the other hand, if the word is used with any wider meaning ambiguity almost inevitably results.<sup>1</sup>

### THE SOCIAL IMPERATIVE

Social intercourse necessarily results in the erection of standards for its own regulation. Every society develops a common perception of what is correct conduct in the relations of the members to one another. Conduct of the kind which is approved by the general sentiment is in a sense prescribed by the common will of the community. The principles thus evolved are re-

<sup>1</sup> It is generally assumed by jurists that law can exist only in a state; and that to the existence of a state a considerable population as well as a certain degree of organization on a territorial basis are necessary. Accordingly, rules promulgated by the chieftain of a nomadic tribe, or of any community too small in point of numbers to be regarded as a state, would not be "laws" in the received meaning of the word, although they were enforced by the supreme power of the particular society. Such rules may therefore be considered as falling into a separate category of their own. But, for the purposes of this treatise, there is no essential or practical importance in this distinction; and it is sufficient to forestall what would at the best be a merely verbal criticism.

cognized as obligatory by its individual members whenever they consciously advert to them. They feel that it would be unworthy of themselves to disregard the standard of behaviour in the society to which they belong ; and they know that any overt contravention of that standard would draw down upon them the disapprobation of their fellows. For the most part, however, the prevailing principles of conduct are followed by well-disposed and normal people as a matter of course without the exercise of any conscious election. Conduct of the kind prescribed is, indeed, largely a matter of habit or even of nature.

The principles thus evolved concern matters of the gravest moment as well as those of comparatively trivial character. Morality (in the popular sense of the word), humanity, honour, etiquette, fashion, and "good form" are comprised within them. Moreover, for the most part, positive laws and customary rules are reinforced by the sanction of this social standard ; while, to a great extent, its dictates correspond with those of the individual conscience. In the opinion of the present writer this system may conveniently be called "The Social Imperative."

In one of the comparatively few dissertations in which this subject has been specifically dealt with by Englishmen the scope and nature of this imperative are explained as follows : The field of daily conduct "is covered, in the case of the citizen, only to a small extent by law and legality on the one hand, and by the dictates of the individual conscience on the other. There is a more extensive system of guidance which regulates



conduct and which differs from both in its character and sanction. It applies, like law, to all the members of a society alike, without distinction of persons. It resembles the morality of conscience in that it is enforced by no legal compulsion. . . . The system is so generally accepted, and is held in so high regard, that no one can venture to disregard it without in some way suffering at the hands of his neighbours for so doing. If a man maltreats his wife and children, or habitually jostles his fellow-citizen in the street, or does things flagrantly selfish or in bad taste, he is pretty sure to find himself in a minority and the worse off in the end. Not only does it not pay to do these things, but the decent man does not wish to do them. . . . The guide to which the citizen mostly looks is just the standard recognized by the community, a community made up mainly of those fellow-citizens whose good opinion he respects and desires to have." <sup>1</sup>

The Social Imperative is, accordingly, the main influence whereby the conduct of the citizen is regulated. In all ordinary circumstances a normal Englishman acts, as a matter of habit and without specially adverting to the foundations of his duty, in accordance with the sentiments and views of his fellow-countrymen. He speaks the truth

<sup>1</sup> Lord Haldane's Address to the American Bar Association at Montreal on 1 September 1913. In that address it was pointed out that Fichte describes this system as "those principles of conduct which regulate people in their relations to each other, and which have become matter of habit and second nature at the stage of culture reached, and of which, therefore, we are not explicitly conscious." Cf. Holland's *Jurisprudence*, 11th ed. pp. 28, 29.

without effort; he fulfils his engagements as a matter of course; he dresses himself in apparel similar to that worn by other members of his class with the same regularity of routine as that with which he takes his ordinary meals; if a passing stranger slips by the way, he helps him up as the result of a volition as instinctive as that which would extend his arm in order to break his own fall. Negatively, he is no more inclined to kill or maim his neighbour than he is to injure himself. This disposition—this habitual mental and moral attitude—in so far as it is caused by anything external to his own conscience, is in the main the result of the prevailing sentiment of the society to which he belongs. The community wills or commands that the conduct of its members should be in harmony with its social feelings; and, by the collective will of the community, its members are individually constrained.

### PUBLIC OPINION

When anyone shapes his conduct according to the views or judgment on a particular matter of those among whom he lives, he defers to the authority of Public Opinion.

In so far as a probable consequence of conduct opposed to Public Opinion is the disapproval of an indeterminate number of the members of the community in question, there is an analogy between the sanction of this authority and that of Custom and the Social Imperative. The important distinctions by which it is separated from them are these. Custom and the Social Imperative are for the most part gradually developed; they are

generally followed subconsciously ; and they prescribe general rules. On the other hand, Public Opinion is a more or less deliberate exercise of judgment or will, or conscious inclination of feeling ; the deference to its authority is to a large extent the result of advertence to its existence ; and its subject-matter is a particular state of facts. The facts may be of the most complicated character : they may comprise, for example, the administration of a group of statutes or the policy of the State towards another Power. But Public Opinion is essentially *ad hoc*. It consists rather of particular commands than of a body of general rules of conduct. Moreover, while Custom and the Social Imperative, to a very large extent, embody the result of the habits and the views of past generations which have been adopted without any consideration of their merits by the living, Public Opinion consists primarily of the views or sentiments of the living themselves.

The existence and efficacy of Public Opinion depend largely upon the extent and rapidity of the communication which takes place between the various members of a society. It is comprehensive and potent in small communities and also in the later stages of modern civilization ; while it is comparatively limited in scope and weak in operation during the intermediate phases of national development.

Thus in the case, for example, of a Saxon tribe before the Anglo-Saxon settlement in England, Public Opinion was probably so general and constant in its operation as practically to coalesce with, or at all events largely to overlap, some of

the other regulating influences which we have reviewed. The assembly of the freemen—combining the leading characteristics of both a legislature and a public meeting—would naturally lead to a highly developed Public Opinion. But in the days of the Conqueror or of the earlier Plantagenets it is obvious that, owing to the want of efficient means of communication between the residents in different parts of the country as well as to the relatively depressed condition of the majority of the inhabitants, Public Opinion, as an influence upon conduct, outside comparatively narrow limits, must have been at a very low ebb.

“While holding,” says Herbert Spencer,<sup>1</sup> “that, in unorganized groups of men, the feeling manifested as public opinion controls political conduct, just as it controls the conduct distinguished as ceremonial and religious; and while holding that governing agencies, during their early stages, are at once the products of aggregate feeling, derive their powers from it, and are restrained by it; we must admit that these primitive relations become complicated when, by war, small groups are compounded and re-compounded into great ones. When the society is largely composed of subjugated people held down by superior force, the normal relation . . . no longer exists. We must not expect to find in a rule coercively established by an invader the same traits as in a rule that has grown up from within. Societies formed by conquest may be, and frequently are, composed of two societies, which are in large measure, if not entirely, alien; and in them there cannot arise a

<sup>1</sup> *Principles of Sociology*, vol. ii. p. 325.



political force from the aggregate will. Under such conditions the political head either derives his power exclusively from the feeling of the dominant class, or else, setting the diverse feelings originated in the upper and lower classes one against the other, is enabled so to make his individual will the chief factor."

For the last century or so Public Opinion has occupied a large place in the life of the English people, and its influence is still increasing in our own time. The working of representative institutions, which have now reached an advanced stage of development in connexion with the central legislature, as well as local administrative bodies all over the land; the general ability of the people as the result of education to understand public affairs and form intelligent views with regard to them; the practice of holding public meetings and of discussing political topics wherever men meet together in social intercourse; and, above all, perhaps, the almost universal habit of reading newspapers, which in themselves are, in one aspect, competitive reflectors of the views of their readers, appear to be bringing the influence of Public Opinion to a condition of pre-eminent potency in the control alike of governments, classes, and individuals.

PROPOSITION VI.—The conduct of individual men is controlled externally by unregulated force, administrative authority, sacerdotal authority, custom, convention, positive law, the social imperative, and public opinion.

## CHAPTER VII

### THE CONTROL OF STATES

FROM the fact that states are corporations of which the members are human beings, it naturally follows that they are, for the most part, subject to the operation of forces and influences corresponding to those by which the conduct of individuals is regulated. It is essential for our present purpose to understand the precise extent of this correspondence and also to form an adequate conception of the consequences of its failure in one important particular.

#### EXTRANEOUS FORCE

States are influenced in their conduct by the existence of the force of other states, just as individual men are influenced by the force residing in others of their own kind.

A small community does not lightly attack, or bear itself in a menacing attitude, towards a Great Power. Any state, indeed, before embarking upon hostilities against another takes into consideration the force which it appears to possess.<sup>1</sup> No state acts as if other states had no force which they could exercise upon occasion.

<sup>1</sup> Cf. Luke xiv. 31, 32.

In innumerable instances, indeed, particular states must have been deterred from aggressions which in themselves seemed desirable by an appreciation of the risk of encountering the power of those states which might otherwise have been their prey.

The restraining influence of this force, although necessarily indefinite and of varying strength, is continuously operative. Moreover, when it is associated with circumstances which constitute a balance of power as between the leading states, history shows that it may be an important factor in the preservation of an equilibrium for a considerable period.

#### ADMINISTRATIVE AUTHORITY

The control exercised in many ways by large states over smaller communities presents a close analogy to the administrative or arbitrary control exercised in the form of occasional or particular commands by an individual superior over his inferior, or by a governing body over those who are subject to its authority.

The perception of this control is largely obscured by the theoretical limitation of the cognizance of International Law to sovereign states or communities of analogous character, and by the juristic theory of the equality and independence of all such states. It should, however, be obvious that, in substance and in fact, this kind of authority has often been exercised by one state over another, sometimes in pursuance of suzerainty or a protectorate; sometimes in pursuance of a hegemony assumed by the former over the race to which the

latter belongs ; and sometimes without any special claim or pretext of right.

Moreover, in modern times, control of this character has been extensively exercised by the Great Powers collectively over the smaller states. In illustration of this, it may be sufficient here to refer to the action of the Concert of Europe from the time of the battle of Waterloo as summarily described by Dr. T. J. Lawrence in the edition of his work on *The Principles of International Law*, published in 1910.<sup>1</sup>

“ At the beginning of the last century a certain leadership was assumed by a group of powers who had borne the brunt of the struggle against Napoleon. At the Congress of Vienna in 1815, France, conquered though she was, succeeded in gaining a place by their side, and in 1818 she was formally admitted to an equal share in their deliberations and decisions. Thus was constituted the Concert of Europe. It consisted originally of England, France, Austria, Prussia (since merged in Germany), and Russia; and in 1867 the newly created kingdom of Italy was added. It has passed through periods of greater and lesser vigour ; but, if now and again it has seemed for a time to be in abeyance, it has always reasserted its position and authority. To describe its activity with fullness would be to write a large part of the international history of Europe during a century crowded with great events. . . . The Great Powers . . . called into being the European order that succeeded the wars of the French Revolution and the conquests of Napoleon, and have supervised many of the im-

<sup>1</sup> 4th ed. pp. 269-71.



portant modifications of it which have since taken place. The kingdom of Greece has grown up under the tutelage of the European Concert, which has more than once restrained it, once secured for it additional territory, and once at least preserved it from destruction. . . . In the case of Belgium, all the Great Powers were formally concerned from the first in its severance from Holland, and all concurred in its neutralization as an independent state in 1839. One of the main objects of the Crimean War, and the only one that has been permanently attained, was to take the power of settling the destinies of the subject Christian populations of Turkey out of the hands of Russia alone, and entrust it instead to the Concert of Europe. Though Austria and Prussia had not been belligerents, they were admitted as Great Powers to the conference that drew up the Treaty of Paris in 1856. And again, in 1878, Russia was not allowed to impose her own terms on Turkey, but they were submitted to a conference, in which England, France, Germany, Austria, and Italy took part, though none of them had been engaged in the conflict. The Congress discussed exhaustively the questions raised by the war, and substituted the Treaty of Berlin for the Treaty of San Stefano, which was regarded as a preliminary document to be modified by general consent. The readjustments that have taken place since have been matters of negotiation between the powers; and the last and greatest of them, the annexation of Bosnia and Herzegovina by Austria in 1908, and the proclamation of the independence of Bulgaria at the same time, have given rise to an acute controversy.

. . . In addition to superintending and controlling the territorial and political changes we have described, the Great Powers received Turkey into the family of nations in 1856, made provision in the same year for the due execution of international works at the mouth of the Danube, conferred the rank of a Great Power on Italy and neutralized Luxemburg in 1867, and granted conditional recognition of independence to Roumania, Servia, and Montenegro in 1878."

The deficiencies of the Concert of the Powers as an administrative body are manifest. This Concert has never rested, like the government of a well-ordered state, upon the foundation of a full and unquestioned sovereignty supported by laws systematically enforced. It has not operated readily and efficiently on all occasions when peace has been threatened. In particular, it has not been by any means uniformly successful in avoiding hostilities between its own members.

In the present position of international affairs, however, we ought not to lose sight of its great value in the past and of the possibilities of its development in the future, which will be considered hereafter in connexion with the subject of a League of Peace. It is of great importance to recognize that, as we shall see in the chapter on Public Right, International Law fails to cover many of the most important aspects of the relations of states, and accordingly that there is wide scope for the exercise of some administrative authority in the great society which they collectively constitute.

## SACERDOTAL AUTHORITY

In the Middle Ages this kind of authority was frequently exercised over states and their rulers. And, even in our own time, if the world as a whole were surveyed, it would not be difficult to find instances of deference to such authority.

## CUSTOM

The history of the relations of states and the body of usages which form the substratum of what is called "International Law" show very clearly the importance of custom in the regulation of the conduct of states. Owing to the universal disposition of mankind to establish customary rules, it could not be otherwise. International usages will be considered hereafter in Chapter X.

## CONVENTION

Treaties have played a part in the regulation of the relations of states closely analogous to that of contract in the sphere of civil life.

"Fundamentum autem justitiæ est fides, id est dictorum conventorumque constantia et veritas." The truth conveyed in this statement of Cicero<sup>1</sup> has been generally recognized by the conscience of mankind as equally applicable to justice between state and state and man and man. "The treaty-breaking state is the great enemy of nations, the disturber of their peace, the destroyer of their happiness, the obstacle to their progress."<sup>2</sup>

<sup>1</sup> *De Officiis*, lib. i. 7.

<sup>2</sup> Phillimore's *International Law*, vol. ii. pp. 56, 57.

“ If faith be taken away, as Aristotle says, the intercourse of men is abolished. . . . And this the supreme rulers of mankind ought to be more careful of preserving, in proportion as they have more impunity for their violations of it ; so that if faith be taken away they will be like wild beasts, whose strength is an object of general horror. And in other parts of its sphere justice has often somewhat that is obscure, but the bond of good faith is manifest of itself and indeed is used to remove obscurity from all other matters.” <sup>1</sup>

### THE SOCIAL IMPERATIVE

The operation of this kind of authority over states is rapidly increasing both in extent and in efficiency.

The governments of states generally speaking refrain from conduct towards other states which would be universally regarded as improper or dishonourable. They also habitually do many things in the interest of other states which are required of them by the general sentiment of civilized mankind.

The scope and efficacy of this imperative must depend upon the extent to which a common sense or will is developed on the part of the peoples of the different states ; and this development will closely follow the approximation of their respective modes of thought and moral standards. This approximation in turn will largely depend upon the extent of their intercommunication and their consequent action and reaction upon one another.

In other words, a common will or sentiment on

<sup>1</sup> Grotius, *De Jure Belli et Pacis*, bk. iii. ch. xxv. 1, 2 (Whewell's translation).



the part of the states of the world will be developed to an extent corresponding from time to time to that to which they become associated as a true community or society.

The development of this Social Imperative will indeed for the most part proceed *pari passu* with that of an international Public Opinion.

### PUBLIC OPINION

The rapidity with which information can now be circulated throughout the civilized world and views and comments thereon exchanged between the inhabitants of different hemispheres; the general practice among the more advanced peoples of reading newspapers; the increasing importance and variety of interests common to the various races; the facilities for travel; and the character of modern life in general, tend to produce conditions in which the formation of a true international opinion becomes possible throughout a constantly widening area. The discoveries of science, and other achievements in the direction of material progress, have to a very large extent cleared the way for a momentous moral advance on the part of mankind collectively.

Everything indeed which tends to facilitate the diffusion of accurate information upon contemporary events, or which assists the several communities of mankind to apprehend it correctly, and therefore similarly, must increase the probability of the formation of a common understanding as to the moral aspects of current discussions. In this connexion it would seem desirable that greater

frankness and less secrecy should be observed in the diplomatic intercourse between governments than has hitherto been the case. This would, indeed, appear to be a necessary condition of the existence of a sound international opinion with regard to the relations between states. In this respect, as in most others, the advantages of publicity are now so obvious and so great that very special and cogent reasons must be forthcoming in order that they may really be countervailed.

In short, the greater the extent to which the minds of mankind at large are applied to the consideration of the same facts at the same time, the more comprehensive and effective will be the body of opinion which they will from time to time collectively form.

In one aspect, the state of contemporary opinion throughout the world during the Great War has marked a considerable advance in the direction of a common feeling and judgment on the part of mankind at large. Never before did so many human beings take an interest in one and the same series of contemporary events as has been the case during its continuance. Never before were so many millions in divers lands substantially of one mind with regard to their true concern in the issues of a great struggle or the moral merits of the causes on behalf of which it was taking place.

On the whole it would seem that we are warranted in basing great hopes upon the development of both Public Opinion and the Social Imperative throughout the society of states. The operation of these influences on the several communities should not be substantially different either in its character or

effect from that of the analogous influences in a particular state upon its own citizens. There can indeed be no well-founded doubt that a comprehensive, alert, and articulate international opinion, and a strong and healthy social sense pervading the civilized world, would be potent influences in the direction of the preservation of peace.

So far we have seen that the conduct of states is controlled by authorities and influences which are essentially similar to those by which the conduct of individuals is regulated. We must now note the important respect in which this correspondence is not found.

#### POSITIVE LAW

Positive Law is, as we have seen in Chapter III, dependent upon the existence of sovereignty. Those to whom it applies must be subject to a common authority charged with the enforcement of its provisions. Owing to the absence of a common sovereignty over the society of states, the necessary condition to the existence therein of positive law is wanting. Accordingly, Law, in the strict and definite meaning of the term, is not among the resources available for the preservation of peace.

A great gap is thus left in the system whereby the conduct of states is regulated. To the existence of this gap the peculiar difficulty of preventing wars is due.

The question thus arises: By what means can the functions of government and law within a state be best fulfilled in the great society of states them-

selves ? In other words, in what way can we best develop an adequate sanction for Public Right and at the same time provide for the proper and effective administration of common affairs of vital importance to the welfare and order of the society of states ?

PROPOSITION VII.—All the means whereby the conduct of individuals is regulated, except positive law, are available for the preservation of peace in the society of states.



## CHAPTER VIII

### THE RELATION OF LAW TO ORDER

**W**E have seen that it is not at present practicable to bring the society of states into full subjection to a common sovereignty, and accordingly that, if peace is to be established in our own time, it must be by virtue of means other than those of positive law.

It therefore becomes important to form a just conception of the value of law in relation to society, as compared with the other forces and influences whereby human conduct is regulated. In this connexion it will be useful to consider whether the future progress of men, even when regarded as the citizens of particular communities, will depend mainly upon the development and perfecting of the reign of law as we now understand it ; or whether the function of law is in a sense transitory—whether, indeed, when men have attained to the full height of their moral nature, the reign of law will be universal or whether it will have been entirely or to any considerable extent superseded by other influences. It is conceived that the examination of these questions will materially further the inquiry as to the practicability and the means of establishing peace on earth.

There can be no doubt that law has for some thousands of years been a factor of paramount importance in the development of civilization. Adapting a Pauline metaphor for our purpose we may say that it has been a schoolmaster by whose discipline men have been trained to just and orderly behaviour.

In our own country this has been the case to a pre-eminent degree. Englishmen indeed have generally felt that the greatness of their nation was largely due to the prevalent respect for law. At a relatively early stage of their history they learned to regard it as the beneficent alternative to despotism as well as to anarchy. By virtue of its general sway they perceived that the worst features of arbitrary government were excluded from their civic life; while violent self-redress of injuries was rendered unnecessary through the provision of adequate and assured remedies in courts of justice. The obligation of agreements between man and man was at the same time firmly upheld. Accordingly for many centuries the fact that a rule was understood to be "the law" generally ensured for it the respect of the people at large. Even where neither the provisions of the rule in question nor the manner of its presentment were in themselves calculated to secure admiration or approval reasonable men usually felt constrained to implicit obedience. The law was moreover a terror to evil-doers. While they sought to elude the vigilance of its ministers, the system itself they regarded with genuine awe.

This being so, laymen, speaking generally, never doubted that the prevalence of law was an essen-

tial condition of social life and prosperity. In their eyes national improvement appeared to depend upon the amelioration of the law and the increasing disposition of the community to obey its dictates for the time being. With this view jurists naturally felt complete professional sympathy. To layman and lawyer alike the absolute reign of a beneficent legal system appeared to be in the nature of an ultimate ideal.

We must, however, carefully consider whether the present attitude of society and its apparent tendencies support this view, or whether they do not rather suggest that it will gradually be essentially transformed.

To what extent then is the conduct of the ordinary good citizen at the present day affected by law? In other words, bearing in mind that "the most obvious characteristic of law is that it is coercive,"<sup>1</sup> to what extent does it cause such a citizen to behave differently from the way in which he would behave if all the rules comprised in the system were merely the recognized enunciation of prevalent opinion, or even were not in existence at all as definitely formulated propositions?

Such a citizen recognizes without question the obligation *in foro conscientiae* of fulfilling his business engagements. "*Pactum serva*," the motto of the great Plantagenet, is among the earliest lessons assimilated by infant intelligence in this country, and is so well established as a governing principle of conduct by the time maturity is reached that its operation is as easy and almost as unnoticed as that of a primordial instinct. The average

<sup>1</sup> Holland's *Jurisprudence*, 11th ed. p. 78.

householder pays his agreed rent and discharges his tradesmen's bills without adverting to the legal necessity for doing so. To him they are essentially, and in the natural sense of the words, debts of honour, and he would not be comfortable if they were not punctually paid. Only when some question arises as to the scope of his agreed liability is any difficulty likely to occur between himself and his creditor. If the parties are then reasonable, as well as honest, their difference may be amicably settled by themselves. Otherwise it has to be adjusted by some one else. So far, indeed, as contractual relations are concerned, the function of law in its actual operation is for the most part limited, as regards good citizens, to the provision of a system of judicature, whereby the decision of a competent and trusted third party may be obtained in cases where the interpretation of a bargain, or its application to certain facts which have ensued upon its formation, is open to honest doubt.

When we turn to the law of torts and the law of crimes, the subordinate part played by the coercive character of law is still more evident. No respectable man has any inclination to kill, or imprison, or wound, or, under ordinary circumstances, to assault his neighbour; or to steal or injure his property; or to impair his reputation; or maliciously and without reasonable cause to prosecute him; or to destroy his domestic happiness. Nor does the just man need to be constrained by legal sanctions to be careful not to run his fellow-citizen down on the highway; or, if anyone is entrusted to his care or skill, whether as the driver



of a conveyance, or as a surgeon or otherwise, to discharge the trust reposed in him by a due display of the care and skill demanded by the occasion. Accordingly, at the present time, the will or conduct of the average citizen is not ordinarily, in any active sense, compelled or governed by the law of torts or the law of crimes.

In regard to certain matters, indeed, it is necessary that there should be a prescribed course of conduct, because the general welfare is dependent upon uniformity of action therein on the part of all. Thus in any country where there are well-defined roads it is essential that there should be a rule for the guidance of those who use them. The importance of the rule as such, apart from its intrinsic merits, is obvious from the fact that the necessary uniformity of conduct is secured in one country by prescribing the right side of the road and in another the left. In all such cases, however, the good citizen complies with the rule without any sense of being constrained to do so by the fear of the penalty attached to disobedience. He does as a matter of course that which is obviously right under the circumstances in which he finds himself.

Accordingly, it appears that conscience and the social imperative are usually sufficient in themselves to keep the good citizen in the paths prescribed by law.

And as his own behaviour becomes progressively less dependent upon the sanctions of the legal system, so his reliance upon these sanctions for the enforcement of the good behaviour of others towards himself diminishes also.

So far as the realm of contracts is concerned,

correlatively to what has been said above, it would appear that the law is practically invoked by such citizens only where an engagement is of doubtful interpretation or effect or where it has been entered into with a dishonest person.

With regard to torts and crimes it is no doubt clear that ordinary citizens in the present state of society would incur grave risks if the sanctions of law were altogether absent. Owing to the number of people who are still of evil disposition, or who do not habitually obey an enlightened conscience, and the fact that the means of self-redress or defence have, as it were, long been suffered to fall into abeyance, the coercive character of law is still important in this connexion.

But, even here, we may discern a weakening in the reliance upon law. Many a householder, on being disturbed by the sounds of the operations of burglars, thinks rather of his policy of assurance than of the capture of the offenders. And the state itself is now becoming sparing in its use of terrors as deterrents from crime. The lot of the criminal has been so much improved in recent years that his avocation, in point of risks, may perhaps compare not altogether unfavourably with certain others. The existence of his class is indeed regarded more or less as a matter of course, like that of His Majesty's Opposition. Punishment is ceasing to be vindictive ; and there is a tendency to regard crime as a symptom of a pathological condition, and the criminal as a subject for curative treatment.

The apparent decline in the relative importance of law is, moreover, very marked in connexion with

the department of the system which concerns the relations between the Crown and the Executive Government on the one hand and the subject on the other. The security which the latter enjoys against arbitrary treatment at the hands of the former now lies rather in public opinion than in any of the provisions of Magna Charta or subsequent statutory enactments or judicial precedents. The various Acts and Orders passed during the War, and the administration of the powers thereby conferred upon civil and military functionaries, have constituted a very striking and conclusive demonstration of this fact.

There appear, then, to be indications that the common weal of Englishmen is now dependent upon law to a less extent than was formerly the case. The same is probably equally true, *mutatis mutandis*, of the citizens of all advanced states.<sup>1</sup>

It also appears quite clear that the respect for law is now less than it formerly was. Not only has its sanction become weaker but its prestige has diminished.

From time to time numbers of honest people in this country have persistently disobeyed particular laws of which they disapproved. But in recent times many have gone much further than this and have committed breaches of existing laws of which they did not disapprove because they desired a particular new law to be passed by Parliament. Nothing of this kind, or at all events no such conduct on the same extensive scale, took place in earlier

<sup>1</sup> The extent to which civilized man is emancipated from the need for positive law is well illustrated by the conditions of life in Spitzbergen for many years past.

stages of our national life. But, judging from the way in which attempts to promote what those who made them believed to be good objects in illegal ways were dealt with formerly, it may reasonably be supposed that any similar conduct would then have been met by the imposition on the part of the legislature or the judiciary of penalties of exceptional severity. The attempt to attain a general public object by forcible methods, as late as, say, the beginning of the eighteenth century, and perhaps long after, would probably have been pronounced constructive treason and punished accordingly. Nowadays a quite opposite course is taken. The ordinary penalties attached by the law to transgressions of the class in question are either entirely waived or mitigated to a point at which they cease to be deterrent. Such occurrences suggest that England, to speak only of this country for the moment, is approaching a condition of general feeling in which it may be impracticable to enforce any law against the organized resistance of a section of the population which is at the same time considerable in numbers and respectable in point of general reputation.

The decline of law in the general estimation of the people admits of explanation.

The respect with which law was formerly regarded was due largely to a certain mystery which obscured its origin. Its substratum was supposed to be the immemorial usages of the race—the customs of remote ancestors. Its exponents were imposing personages, surrounded by much pomp and ceremony, whose proceedings in the administration of their criminal jurisdiction were characterized by



relentless severity. Even in so far as the law had been embodied in statutes of the realm, it was the work for the most part of sages and magnates whose social rank elevated them far above the average plain citizen. It is true that occasionally the provisions of a statute gave effect to a really popular demand. But, until the time of the Reform Act of 1832, the legislation of Parliament was for the most part more or less the work of lawyers and other experts with the assistance of members of the aristocratic classes. To the multitude the law as a whole was characterized by the awfulness of a majesty concealed in the darkness of the unknown and the unknowable.

The extension of the franchise, working in conjunction with the absolutely unlimited sovereignty of Parliament in the United Kingdom, produced in these respects a fundamental change. Since 1832 the great activity of the legislature and its reflection of public opinion have gradually brought home to the mind of the ordinary citizen the fact that the law is largely the embodiment of the opinions of people like himself, and that it lies within the power of a majority of the electors to make it whatever they please.

“In England . . . the beliefs or sentiments which, during the nineteenth century, have governed the development of the law have in strictness been public opinion, for they have been the wishes and ideas as to legislation held by the people of England, or, to speak with more precision, by the majority of those citizens who have at a given moment taken an effective part in public life.”<sup>1</sup> “The

<sup>1</sup> Dicey's *Law and Opinion in England*, pp. 9-10.

close and immediate connexion . . . which in modern England exists between public opinion and legislation is a very peculiar and noteworthy fact, to which we cannot easily find a parallel. Nowhere have changes in popular convictions or wishes found anything like such rapid and immediate expression in alterations of the law as they have in Great Britain during the nineteenth century, and more especially during the last half thereof.”<sup>1</sup>

It might have been thought that law, when recognized as the will of the majority of the community, would have appeared more truly worthy of respect than it did in its earlier aspect of clouded mystery. But a little consideration will show that the contrary must be the case. Indeed, paradoxical as it may sound, the truth is that the more thoroughly law is recognized to be in conformity with public opinion the less will be its authority as law.

The general coincidence of law with public opinion indirectly causes the growth of a sentiment that any inconsistency is mischievous. The rapidity with which public opinion is usually reflected in the law develops an impatience when such reflection is delayed. The personal share of the elector in the process of legislation precludes any superstitious veneration on his own part for the result. The more plainly it is seen that law rests upon the consent of the people, the greater is the tendency for those who disapprove of any of its provisions to lose their respect for its authority.

But more than this. The greater the extent to which, and the rapidity with which, public opinion is embodied in law, the greater is the tendency for

<sup>1</sup> Dicey's *Law and Opinion in England*, p. 7.

public opinion—apart from its enactment by the legislature—to become the real authority, to which men readily defer. As soon as they feel that it is certain that public opinion will speedily become law, a natural tendency is set up to regard public opinion itself as the really important and substantial matter and law as mainly formal. Thus public opinion is obeyed before it becomes law, while there is a tendency to cease to obey the law in so far as it fails to embody public opinion. In other words, he who regards law as in its essence formulated public opinion may easily be led to repudiate the obligatory effect of a statute the provisions of which he thinks are at variance with that opinion.

But even where the law is coincident with general opinion it is not beyond the reach of processes whereby its authority is being undermined.

“With progress,” says Herbert Spencer, “towards a popular form of government . . . though the obligation to do this and refrain from that is held to arise from state-enactment; yet the authority which gives this enactment its force is the public desire. Still it is observable that along with a tacit implication that the *consensus* of individual interests affords the warrant for law, there goes the overt assertion that this warrant is derived from the formulated will of the majority; no question being raised whether this formulated will is or is not congruous with the *consensus* of individual interests. In this current theory there obviously survives the old idea that there is no other sanction for law than the command of embodied authority; though the authority is now a widely different one. But this theory . . . is a transitional theory. The ultimate

theory, which it foreshadows, is that the source of legal obligation is the *consensus* of individual interests itself, and not the will of a majority determined by their opinion concerning it; which may or may not be right. . . . Already in respect of religious opinions there is practically conceded the right of the individual to disobey the law, even though it expresses the will of a majority. . . . These ideas and feelings are all significant of progress towards the view, proper to the developed industrial state, that the justification for a law is that it enforces one or other of the conditions to harmonious social co-operation; and that it is unjustified (enacted by no matter how high an authority or how general an opinion) if it traverses these conditions. And this is tantamount to saying that the impersonally derived law which revives as personally derived law declines, and which gives expression to the *consensus* of individual interests, becomes, in its final form, simply an applied system of ethics—or rather of that part of ethics which concerns men's just relations with one another and with the community." <sup>1</sup>

The fact, however, that the decline of the respect for law admits of these explanations by no means deprives this decline of its significance. There is no room for reasonable doubt that the present inhabitants of this country are in a state of moral development higher than that of their ancestors at any period since the various races to which they owe their origin were fused into one. Accordingly, if their future progress were mainly dependent upon law it might reasonably have been expected that

<sup>1</sup> *Principles of Sociology*, vol. ii. pp. 533-4.



their respect for law would have been greater than that of their predecessors. The evidence that the contrary is the case, and that, indeed, the respect for law is still declining, appears to suggest that the promise of the future lies mainly with other agencies than that of law.

The progressive emancipation of civilized man from the necessity for law is moreover not confined to its coercive aspect as a system resting upon external sanctions.

The more highly developed a human being is, the less is the need for providing him with an elaborate code of rules. The tendency of moral progress is to cause the merger of multitudinous regulations—for practical purposes—into a few guiding and comprehensive principles which assist the conscience of the individual and tend to become incorporated in the social imperative. Of many possible illustrations of this process it may suffice here to indicate two.

In the Old Testament and the Rabbinical writings a body of rules and regulations was provided for the guidance of the conduct of the Jews which was so large that none but persons specially skilled therein would have been likely to have a thorough mastery of the whole. But the duty of man to his fellow-creatures was summarized by Christ in a very few words: "As ye would that men should do to you, do ye also to them likewise."<sup>1</sup>

In England the laws of contracts, torts, and crimes are not fully ascertainable without reference to books which are so numerous and widely scattered that no living lawyer could possibly be familiar

<sup>1</sup> Luke vi. 31.

with them all. But, for the practical purposes of the honest man, may not their purport be conveyed adequately thus : " Keep your promise and injure no one " ?

It seems, therefore, that, as mankind progress, they become less dependent for their welfare and peace upon the specific provisions of elaborate systems of jurisprudence. More and more they are able to rely, for the guidance of their ordinary conduct as individuals, upon the broad principles illuminating the active conscience and the unceasing direction of the social imperative. During the countless generations for which men have lived together in communities they have in fact been gradually learning the obligations which result from social existence, and their perception of these has become a part of their developed nature.<sup>1</sup>

It may then be concluded that the prime virtue of positive law lies in its operation as an indispensable specific against wrongdoing in a certain stage of social evolution.

After any particular community has ceased to consist only of a small horde whose feelings could be manifested at a meeting attended by all, a period must usually follow when public opinion is more or less in abeyance and the social imperative is inadequate to the regulation of daily life and conduct.

<sup>1</sup> On the other hand, it is important to bear in mind, in connexion with the subject of this treatise, that the requirements of any community collectively are continually changing. Accordingly, the necessity for ordinances of an administrative character, prescribing from time to time the obligations of the citizen to the community—his contributions to central and local expenditure, his personal services to the state, and the like—continues in full operation.

And until the community acquires an advanced civilization, with the accompanying facilities for communication and the diffusion of information and a degree of education and intelligence commensurate with the enlarged scope and varied character of its common affairs, it cannot regain a public opinion or develop a social imperative adequate for the prevention of wrongdoing. If during this period order is to be established and maintained, positive law enforced by a central government must prevail. So long as other means of regulating conduct are insufficient, the existence of law is necessary for the purpose of providing a standing probability that evil consequences will be suffered by transgressors.

It is quite clear that, down to our own time, law has been essential to national life and progress in England. And many years must elapse before it will cease to be necessary either in this country or elsewhere. Possibly, indeed, long ages will pass away before the whole of mankind will have outgrown its uses. Nevertheless, viewing the world at large, it may safely be said that the importance of law is steadily diminishing. The apprehension of the sentence of a Court of Justice as a motive to right conduct is being replaced by deference to a rule or mandate which is felt to be in itself obligatory, either as the ordinance of the will of society or as the direction of the individual conscience. The extent of the dominion of the social imperative, public opinion, and conscience is steadily increasing.

In this connexion it is to be observed that, while it may be anticipated that the development of the society of states will, to some extent, be analogous

to that of a society of individual men, no exact correspondence is probable or indeed possible. Two reasons for divergencies are apparent. In the first place, as we have seen, the development of a community of individuals into the highly organized form of society called a state has been almost everywhere due to the exigencies of defence against other societies; whereas, from the nature of the case, outside the community of states as a whole no other society could exist. In the second place, the development of particular states as such has been for the most part by no means dependent upon the previous existence among their peoples, as a condition precedent thereto, of any advanced civilization or the prevalence of an elevated standard of morality. On the other hand, the development of a true social order throughout the society of states will be possible only when mankind shall have attained a stage of moral advancement higher than any which has hitherto been reached.

Accordingly, it is not to be inferred from the necessary function of law in the development of particular states that it will have a similar function with regard to the development of a world-wide society.

PROPOSITION VIII.—The importance of positive law in the regulation of the conduct of civilized mankind tends to diminish.



## CHAPTER IX

### THE ESSENTIAL SANCTION

**I**N the present stage of the moral progress of mankind it is still true of any large community that the direction of the individual conscience and the impulse of the social sense are in themselves insufficient to secure the general welfare and maintain permanent order. Some external restraining force—some sanction of general rules of conduct and administrative orders—remains an essential element in social life as at present constituted.

We have seen that, for the most part, the actions of men are carried out without conscious advertence to any obligatory motive for performing them. But every one occasionally engages in reflection before he determines upon a particular line of conduct. In such instances an ordinary citizen will generally form his decision in accordance with the social sense of the community to which he belongs so far as it is immanent in himself. He will do what he believes is becoming to him as a citizen, or as a gentleman, a professional man, a public official, a trader, a workman, or a servant, as the case may be. He will act with what he deems to be propriety or good taste, or good form, or in

accordance with honour or the social duty of one who occupies his particular situation in the world. In some cases, however, he will advert to the still higher authority of his own individual conscience and will do what he conceives to be right according to that supreme standard. But, in exceptional cases, such a citizen, owing to the effect of anger or some other specially disturbing cause, may be so strongly inclined to act in contravention of his social sense and even of his conscience that the mere risk of his own self-disapprobation would not be sufficient to deter him from such action. If, under these circumstances, he is to keep in the right path, his will must yield to a direction which is imperative by virtue of the fact that it is supported by a sanction external to himself.

What then is the essential characteristic of this regulating factor which society everywhere provides as a prime necessity of its own orderly existence ?

In the case supposed, the citizen apprehends that, if he contravenes the social will of the community, he will probably incur evil consequences at the hands of that community, the collective power of which is greater than his own. Such consequences will vary in certain important particulars according to the kind of conduct which is in question. If positive law concurs with the social imperative in forbidding it, they will consist primarily of a penalty, generally indefinite in extent, pronounced by a Court of Justice and carried into effect by executive officials of a certain class. If it is otherwise, the probable consequences will consist mainly of an indefinite penalty, such as, for example, being "cut," censured, boycotted, hustled, or even

subjected to the last extremity of personal violence, inflicted by persons who cannot be determined with precision beforehand. A breach of the law as such involves the legal sanction ; a breach of the social imperative as such involves the social sanction. The law and the social will respectively are imperative by virtue of these sanctions. In most cases the law, and in many cases the social imperative, is enforced by both.

The coercive operation of external sanctions is of course specially necessary in the case of a citizen of bad disposition. Such a one, moreover, will be restrained from wrongdoing mainly by the apprehension of the punishments incident in a settled community to breaches of the law, whereas the ordinary man will be restrained from transgressions—so far as the restraint is external—almost entirely by the apprehension of social disapproval and its inevitable manifestations.

Now, whatever be the precise scope of a particular sanction, and whether it be legal or social, its essential characteristic is that it is a *probability*, rather than a certainty, of evil consequences in the case of wrongdoing. To take one illustration, manslaughter is prohibited by the law of this country. The sanction of this prohibition is any term of incarceration up to that involved by a life sentence. A man may commit what is in fact a grave case of this crime. But the crime itself may not be detected ; or the offender may escape ; or those who are cognizant of the circumstances may neither prosecute him nor give information to the police authorities ; or, upon a trial, justice may miscarry altogether, or the punishment may be only nominal.

Similarly, a man may be guilty of conduct of a kind which, although not criminal, is regarded by the community as disgraceful. But the offence may remain secret, or those who discover it may not expose the offender, or for some other reason he may escape serious animadversion upon his conduct. The degree of uncertainty as to the actual infliction of the evil in question need not, however, necessarily be greater in the case of a social sanction than in that of a sanction of the law. In both cases alike the restraining power—the real sanction—is the *probability* of evil only. The fact that the evil if suffered at all will in the one case be inflicted by functionaries of the state, and in the other by persons who cannot be precisely determined beforehand, distinguishes the two classes of sanctions ; but it is well that the importance of this distinction, substantial as it is, should not be over-estimated.

In a modern state, under normal conditions, offences which are generally regarded as grave are, for the most part, prohibited by the criminal law, and this is administered in a way which satisfies the public feeling against criminals. Spontaneous intervention on the part of ordinary citizens in the infliction of punishment in such cases is wholly unnecessary. Any such intervention indeed would in itself amount to an assertion of an authority in rivalry to that of the established government and constitute disorderly and insubordinate conduct. Under these circumstances legal sanctions are in practice so clearly distinguished from social sanctions that their essential similarity is concealed.

But in any community where the Courts of Law fail to punish offenders to the satisfaction of the



public it is different. If, through the delays and uncertainties of legal procedure, or the weakness of the central government, or the fact that sovereignty and the reign of law have not been fully established, society is not adequately protected by legal sanctions, it tends to take the punishment of transgressors into its own hands in comparatively irregular ways. The essential resemblance on the part of social sanctions to the sanctions of law is then more obvious. Indeed, we may say generally that, in so far as in any human society offences are not repressed by the means of sovereignty and law, there is a tendency on the part of the members of the community to protect themselves by other means and for social sanctions to assume in practice, as well as in principle, a close resemblance to the sanctions of law.

It appears, then, that the sanctions which are necessary for the protection of society as it now exists consist of the probability of evil to be incurred by those who offend its collective will. It has now to be noted that this probability rests upon the Force of the community. Unless the offender be for practical purposes weaker than those whose will he has contravened—unless as it were he is in a minority—he cannot have offended any true law or the social imperative. No real sanction could have existed to restrain his action, nor indeed could any social sense have willed the contrary.

And even though in a law-abiding state the social sanction may for the most part take the form of a mere manifestation of general disapproval, it none the less rests upon Force. The disapproval owes

its deterrent character—its effectiveness as a sanction—to the fact that it is really irresistible and in the last resort may become overwhelming.

Accordingly, it may be said that it is essential to the good order of any community that certain rules of conduct and administrative ordinances should be supported by a sanction consisting of a probability that those who transgress them will suffer evil at the hands of the community through some of its members acting either *de jure* or *de facto* on its behalf. The true function of force in the regulation of conduct is the provision of the means of creating this standing probability. And the probability that a society will exercise its inherent force upon appropriate occasions may be sufficient to constitute an effective sanction although it may not be wielded by a sovereign authority or in accordance with positive law.

This sanction is necessary to the maintenance of order not only in any society of individuals but also in the great society of states.

The question thus arises whether the society of states can provide this sanction. Can they make such arrangements as will establish a standing probability that any state which violently opposes the general welfare will be overcome and punished by the might of other states?

Latent in the society of states there must necessarily be the force sufficient to inflict evil upon a state which opposes the general will. And inasmuch as there is no established sovereign authority over this society, there is nothing to render the infliction of such evil by the spontaneous action of particular states improper or unnecessary. Up to the present

time, however, the probability that this force would be exerted in an appropriate case has not existed, or, at all events, has not been sufficiently strong to prevent the outbreak of aggressive wars.

Such a probability will be practically established only if means are devised whereby this force may be set in motion and brought to bear effectively against disturbers of the peace.

PROPOSITION IX.—The proper function of force in the regulation of conduct is the provision of a standing probability that violent opposition to the general will of a society will be restrained or punished ; and the force of any society is necessarily adequate for this purpose.

## CHAPTER X

### PUBLIC RIGHT

THE operation of general rules in maintaining order is limited by the extent to which the process of social integration has proceeded among those to whom they are addressed. And this process can be inchoate only in any aggregate so long as the bulk of the individuals lack homogeneity in character and their mutual relations are intermittent or unstable.

Owing to the great diversities between the various races of mankind; the very limited and imperfect intercourse between them; the absence of any universal and comprehensive social sense or community of sentiment; the constant changes in the absolute and relative composition and strength of states; the instability of their relations with one another; and the dynamic character of their existence: the world regarded as a whole has—at all events until quite recently—continued in a rudimentary condition of social organization and cohesion. Naturally, therefore, there have always been grave difficulties in the way of the effective regulation of the conduct of states by general rules; and it is by no means a matter for surprise that their behaviour to one another has never



hitherto been consistent with the maintenance of general order.

It is, however, the fact that a body of rules and principles is in existence which is generally supposed among civilized men to be binding upon states in their mutual relations. The nature and content of these rules and principles we must now consider critically. We shall then be in a position to judge how far they satisfy the need of a standard of public right and how far they leave room for the necessity of administrative action in the regulation of the conduct of states.

International Law is a subject which is always of immediate practical importance. Yet it is extremely difficult to gain a just conception of its nature and provisions or to form a reasonable estimate of the extent to which it influences the conduct of mankind.

It is easy to distinguish International Law from Positive Law or Law as it prevails in any particular state. Positive Law consists of rules of conduct binding upon the citizens of a state and enforced by the supreme authority therein. Its distinctive characteristic is the definite sanction by which the authority of the rule is supported—the probability that its violation will be followed by a coercive order made by a tribunal of the state and carried into effect, where necessary, by executive officers. On the other hand, International Law has not hitherto been systematically enforced by any supreme authority. It postulates, indeed, that no such authority exists. It is not supported at present by any sanction beyond the probability that a clear and important breach of its provisions

committed without any extenuating circumstances would be generally disapproved throughout the society of states. The possibility of war has never up to the present time constituted a true sanction : for a standing probability that the aggressive state would be defeated has not hitherto been established.

International Law, says Professor Holland, "differs from ordinary law in being unsupported by the authority of a state. It differs from ordinary morality in being a rule for states and not for individuals. It is the vanishing point of Jurisprudence ; since it lacks any arbiter of disputed questions, save public opinion, beyond and above the disputant parties themselves, and since, in proportion as it tends to become assimilated to true law by the aggregation of states into a larger society, it ceases to be itself, and is transmuted into the public law of a federal government. The realization of the '*civitas maxima*' of which theorists have dreamed would thus be not the triumph but the extinction of International Law, which can subsist only between states which, on the one hand, sufficiently resemble one another, and are closely enough knit together by common interests to be susceptible of a uniform pressure of public opinion, while, on the other hand, they are not so politically combined as to be controlled by the force of a central authority." <sup>1</sup>

<sup>1</sup> *Jurisprudence*, 11th ed. pp. 386-7. It is to be observed that the designation of the system as "International Law," which was introduced by Bentham, is in itself somewhat unfortunate. The system applies between states, and not between nations, and can be called "law" only by a very extended use of this word.

For reasons, however, which have already been partly indicated and which will be more fully considered hereafter, the perception of the fact—important as it is—that International Law has hitherto not been supported by an adequate sanction, should not in itself lead us to depreciate the actual, or still less the potential, value of the system.

But, when we turn to the positive side of the subject, great care is necessary in order to keep on anything like firm ground. What is International Law? what are its provisions? and how far do they consist of operative rules which really regulate the conduct of states?

In the first place it is necessary to observe that International Law, to use the terminology of Grotius, is the *Jus Belli ac Pacis*. No one could read the work of this great man without perceiving that it is mainly a treatise on war. And, indeed, by far the greater part of the definite rules which are comprised in the system at the present day are concerned with the conduct of war as between one belligerent and another and as between the belligerents and neutrals. The value of these rules, regarded collectively, is not likely to be overestimated. But inasmuch as, in this treatise, we are concerned with the preservation of peace—the primary object of rules of conduct—they are irrelevant to our purpose.

¶ The present inquiry is then limited to the *Jus Pacis*. What is the International Law of Peace?

¶ It has recently been stated by a high authority that International Law “originates in the practice and usage long observed by civilized nations in their

relations towards each other or in express international agreement.”<sup>1</sup>

If in this sentence the word “nations” be understood to mean states, it may be accepted as a compendious indication of the nature of that part of the system, called by jurists International Law, which consists of definite rules of real validity—that is to say, rules the provisions of which can be stated clearly and the obligatory character of which is the subject of general recognition.

For many centuries, speaking generally, every civilized man has owned allegiance to some particular community called a state. Each state has exercised control throughout a definite land area, and states with sea-coasts have asserted their authority over the adjacent waters. The citizens of the several European states have to a greater or less extent respectively traded with the citizens of other states, and visited their territories. The governments of the various states have maintained intercourse with one another by accredited diplomatic agents and also by the occasional exchange of visits between their sovereigns or chief rulers and ships of war or other armed forces.

In other words, each state has exercised sovereignty over its natural born subjects within its own territory, and has also recognized them as its citizens wherever they might for the time being chance to be. It has also exercised a temporary jurisdiction over ordinary foreigners while they were within its own borders or the waters adjacent thereto. But

<sup>1</sup> Lord Parker of Waddington, delivering the judgment of the Judicial Committee of the Privy Council in *The Zamora*, Law Reports [1916], 2 A.C. 77 at p. 91.



the several governments have received one another's agents on the footing that they should be treated in such a way as to render the due discharge of their representative functions practicable. They have also received sovereigns, ships of war, and other armed forces, on the understanding that their distinctive characters should be respectively observed.

These fundamental conditions of the actual life of Europe have been recognized by jurists; and their necessary implications form the substratum of the International Law of Peace. The fact that a particular government exercises control over a particular area, without habitual interference on the part of any other government, entitles it, in the view of the jurist, to continue to exercise such authority. The actual status is clothed with a jural character. So long as it endures the implications of sovereign rights and jurisdiction follow.

The fact of control which in the case of land forms a clear and definite basis for the jural conception of sovereignty and the usages naturally arising out of possession, do not, however, exist in the same way with regard to the parts of the globe which are covered by water. On the one hand, the high seas are not susceptible of appropriation; while, on the other, the waters adjacent to land, to undefined limits, are susceptible of control, and the exercise of this is essential in the interests of the bordering states. Moreover, intercourse between states involves the passage into the territorial waters of one state of ships containing organized parties of the citizens of other states. From these circumstances there obviously arises the necessity for some usages regulating the respective rights of states with regard

to the seas, but the extent of the necessary rights is not indicated by the fundamental facts of the case with the same certainty as in the case of the land. Accordingly, we find that international usages with regard to the seas, while by no means devoid of authority, are largely wanting in precision.

The true character and degree of acceptance of the usages in this connexion are well shown in the following passages from the admirable work of the late Mr. W. E. Hall on *International Law*.<sup>1</sup>

“In claiming its marginal seas as property a state is able to satisfy the condition of valid appropriation, because a narrow belt of water along a coast can be effectively commanded from the coast itself either by guns or by means of a coastguard. . . . On the assumption that any part of the sea is susceptible of appropriation, no serious question can arise as to the existence of property in marginal waters. Their precise extent, however, is not so certain. Generally their limit is fixed at a marine league from the shore ; but . . . perhaps it may be said without impropriety that a state has theoretically the right to extend its territorial waters from time to time at its will with the increased range of guns. . . . In any case the custom of regarding a line three miles from land as defining the boundary of marginal territorial waters is so far fixed that a state must be supposed to accept it in the absence of express notice that a larger extent is claimed.

“It seems to be generally thought that straits are subject to the same rule as the open sea. . . . This doctrine, however, is scarcely consistent with the view, which is also generally taken, that gulfs

<sup>1</sup> 6th ed. pp. 151-7.

of a greater or less size in the opinion of different writers, when running into the territory of a single state, can be included within its territorial waters ; perhaps also it is not in harmony with the actual practice with respect to waters of the latter kind. . . . In principle it is difficult to separate gulfs and straits from one another. . . . On the whole question it is scarcely possible to say anything more definite than that, while on the one hand it may be doubted whether any state would now seriously assert a right of property over broad straits or gulfs of considerable size and wide entrance, there is on the other hand nothing in the conditions of valid maritime occupation to prevent the establishment of a claim either to basins of considerable area, if approached by narrow entrances such as those of the Zuyder Zee, or to large gulfs which, in proportion to the width of their mouth, run deeply into the land, even when so large as Delaware Bay, or still more to small bays, such as that of Cancale.

“ In all cases in which territorial waters are so placed that passage over them is either necessary or convenient for the navigation of open seas, as in that of marginal waters, or of an appropriated strait connecting unappropriated waters, they are subject to a right of innocent use by all mankind for the purposes of commercial navigation.”

Again, the fact that intercourse between states has been maintained by agents who, in order that the objects of their mission should be conveniently and completely achieved, have necessarily been treated on a special footing, has involved the growth of definite usages as to their immunity from the jurisdiction of the states to which they are accredited.

These usages constitute one of the largest and most authoritative departments of the international system. If, indeed, we read such a chapter as that of Mr. Hall on "Sovereignty in Relation to the Territory of the State" we find that, for the greater part, it is concerned with a discussion of the immunities of the sovereigns, diplomatic agents, and armed forces of foreign states. Here also we perceive that International Law has actuality. It consists of propositions which naturally follow from existing states of fact, and which are supported by definite usages which have long been very generally and continuously observed. It is especially noteworthy in this connexion that, even during the Great War, the immunities of diplomatic agents have for the most part been respected by all the belligerents.

The intercourse between states has also naturally given rise from time immemorial to express agreements between them. The disposition to make contracts is universal in social human nature. The making of any kind of agreement necessarily involves the assumption on the part of both parties that its provisions ought to be observed. This necessary assumption is recognized by International Law; and much has been written by jurists upon the subject of treaties. But all that is of real validity in this connexion may probably be correctly summarized in the statement that *the provisions of a duly concluded treaty ought to be observed according to their true meaning and intent*. Treaties will occasionally be violated until human nature becomes perfect. But the principle of their obligatory effect is immutably founded in the social nature of mankind.



It is thus apparent that the system known as International Law consists, to a considerable extent, of usages which have naturally and necessarily arisen out of the salient facts of state existence and the intercourse which has taken place between the governments of states and between the citizens of the various states respectively with the citizens of other states. So far as Europe, or the world, has maintained general social relations—so far as a genuine European or world-wide society or social life has existed—usages to regulate these relations and social life have been necessary. Such usages have accordingly been evolved naturally, and they have constituted a system which in the main has fulfilled its proper function. To this extent International Law is the recognition and expression of the jural consequences of the realities of the existence of states and of the relations between their governments and between the government of one state and the citizens of another. It is a body of customary rules of practical utility and real authority; and there is a general assumption on the part of civilized mankind that these rules will be observed, as in fact they generally are.

But a glance at the table of contents of any standard work on International Law, still confining our attention to the rules of peace, will make it clear that writers upon the subject do not by any means limit it to usages such as we have been considering. In their view the system largely consists of rules of the Civil Law applied to the regulation of the relations of states *inter se*. In other words, certain rules which arose out of the relations of individuals as citizens of a particular state have been declared

by jurists to be binding upon the governments of states. It follows that these rules have not been naturally evolved from the existence of states and the relations between them or their citizens. They have in fact been artificially imported into the discussion of controversies which from time to time have arisen between states by the ratiocinative skill of legal experts.

States have from time to time founded colonies in territories unoccupied by civilized races. Successive occupations by different states on the same continent have naturally led to disputes as to boundaries. The statesmen of the rival powers have called in the assistance of lawyers. The lawyers have almost inevitably conducted their arguments upon the basis that rules of the legal system with which they were all alike familiar were properly applicable to the matters in hand. Accordingly, agreements and arbitral awards concerning the acquisition and retention of territory have commonly proceeded upon the assumption that the rules of the Civil Law as to title by *occupatio* and *accessio* were binding between states. In a sense, therefore, it may be said that these rules are part of the International system.

But a close examination of the classic cases of disputes as to title to territory reveals the difficulties inherent in the application of rules regulating private ownership to rival interstatal claims to vast tracts of newly discovered continents. Too often, indeed, the attempted presentation of the supposed rule by writers on International Law is little more than a narrative of successive quarrels and unadmitted claims, which leave it by no means clear

whether any particular recorded case is properly to be regarded as a precedent tending to establish a general rule or as an illustration of conduct which is to be deemed illegal.

Accordingly, when it is considered how inadequate the rules in question really are for the purpose in view, how often they have been disregarded or evaded, and how little has been the effect which they have had in determining the conduct of states, until after critical quarrels have arisen, it would be misleading to attribute to them an efficacy like that of the usages to which we have referred above.

The civil law of Rome, it must be remembered, consists entirely of law adapted to the requirements of a settled community of individuals—a community which has reached a stable form. And International Law, at the same time that it purports to adopt the principles of this system of jurisprudence, assumes that the *status quo* in respect of the territorial possessions of states is legally immutable. It has, however, been pointed out in Chapter II that, although statesmen as well as lawyers habitually express themselves as if political geography were permanent, it is in fact constantly changing. Moreover, even at the present time, the states of the world considered collectively constitute only a rudimentary social organism. Many years must pass away before they develop into a true community and acquire a stable social structure. Meanwhile, much will be necessary for the effective adjustment of the relations of states which is altogether outside the scope of Roman jurisprudence.

We pass now to consider a third aspect of International Law.

As presented by Grotius and the text-writers who have followed him the system consists, not only of the usages of states and the rules of the *Corpus Juris Civilis* which have already been considered, but also of the provisions of the Law of Nature so far as it is applicable to the relations of states.

From very remote times it must have been observed that the normal civilized man has a faculty of perceiving a difference between right and wrong and of forming moral judgments accordingly. It is therefore easy to understand why many philosophers during the last three thousand years have adopted the hypothesis of a Law of Nature. The conception of a universally obligatory Law, the dictates of which are assumed to be the appropriate objects of the apprehension of the conscience, is the logical complement of the conception of a moral sense. "Moral duty was by" the Stoics "practically deduced from, or identified with, the Law of Nature."<sup>1</sup>

The theory of the Law of Nature has, however, usually been more or less associated with conceptions which are not essentially connected with the moral sense of mankind. By an easy and obvious transition of thought it was supposed that this Law prevailed at the remote period of the infancy of the human race, when men were living in a state of nature; and, accordingly, that its provisions were obligatory upon rational creatures whenever they were not associated together in a common civil allegiance.

If the writers on the "Law of Nations" had

<sup>1</sup> Bryce's *Studies in History and Jurisprudence*, vol. ii. p. 137.



adopted the theory of the Law of Nature merely as the hypothesis of the principles communicated by Nature to the soul of man, and had been content with the proposition that a state is substantially and practically, as well as by analogy, a moral entity, and therefore subject to the obligations which are incumbent upon the consciences of individual men, they would have enunciated in a convenient and unobjectionable form a truth of fundamental importance, upon which even at the present day it is still necessary to insist. Instead of this they directed their attention to the conception of the Law of Nature as the system of principles assumed to have been applicable to the relations of men while living in a state of nature. They then proceeded to argue that, as states were not themselves subject to any common sovereignty, they were *inter se* in a state of nature, and accordingly that the Law of Nature in this secondary meaning must be obligatory upon them.

The theory of a Law of Nature adopted in this sense has been a fertile source of illusion and confusion. Any law, even though it be identified with the dictates of conscience or of the supreme authority over man, by whatever name it may be called, so far as it purports to regulate the relations between human beings, presupposes their social nature. The development of rules of conduct can proceed only *pari passu* with the development of society. Any rules or principles which apply to the relations of either individuals or states must depend for their obligatory effect upon the existence of social conditions, however rudimentary they may in fact be.

Accordingly, when International Law, as expounded by the jurists, proceeds to enunciate the logical consequences of the fallacious doctrine that states as between themselves are in a state of nature, it parts company with reality and utility. It propounds the dogmas of the independence of every separate state and of the equality of all states with one another. These dogmas are open to objection not only, or indeed mainly, because they do not correspond with existing facts. They could not be accepted in practice without destroying all reasonable hope of the prevention of war, or indeed without undermining such social order as now prevails throughout the world.

Good sense and the demands of practical utility arising from the common interests of states have proved far too strong for the jurists in this connexion. In so far as the system of International Law is to be taken as incorporating these supposed deductions from an imaginary law—a law which could never have prevailed at all under the circumstances assumed—it has always been more honoured in the breach than the observance. It differs *in toto* from the other departments of the system with which we have dealt. It is not based on inveterate usage ; nor does it rest upon an analogical extension of the rules of a body of jurisprudence which is generally recognized as a guide to the decision of cases which are not covered by any local law. It has indeed no real validity whatever.

“No principles,” said the late Dr. Lorimer, writing in 1883,<sup>1</sup> “have been repeated more fre-

<sup>1</sup> *Law of Nations*, vol. i. p. 44.

quently or authoritatively than the equality of states and their absolute independence, except perhaps their counterparts, the balance of powers and the *status quo* ; and all of them may now, I think, be safely said to have been repudiated by history, as they always were by reason."

If the reader were now to turn to any well-known book on International Law, he would perceive that, in what has been said in this chapter, we have in effect briefly indicated and reviewed the principal provisions of that part of the system which consists of the rules of peace.

The resulting conclusion appears to be this. International Law, in so far as it propounds as general principles the necessary implications of the separate political existence of states and incorporates the inveterate usages prevailing between the governments of states and between the government of one state and the citizens of others, is of indubitable and permanent value. So far as it purports to go further, its validity is more or less open to question. In indicating a standard of legal principles, to which, in cases of dispute, statesmen can appeal as plausible alternatives to forcible means of decision, it has, to an extent which it would be difficult to gauge, proved from time to time of great practical utility. It has also been of service in contributing to the development of the conception that a state is a moral entity and bound to comport itself accordingly. But, in so far as it has been committed to vague generalizations deduced from an imaginary Law of Nature serious obstacles have been raised to its own progressive development.

It follows that no one who has a just and comprehensive conception of International Law should feel any surprise that it has not proved an effective means of preventing wars.

It may well be that in the future the utility of the system will be enhanced in many respects by international conventions giving a more definite character to certain of its provisions. But in this connexion it should not be forgotten that every rule is in a sense a limitation of liberty and only to be justified by its practical utility. Unless a rule is from its nature likely to be observed in critical cases by all the states concerned it may well prove in its general result predominantly mischievous.

For the rest, the salient truth is this. If everything possible were accomplished for the improvement of International Law—even indeed if an adequate sanction for its provisions were provided—it would still in itself be a wholly insufficient means of maintaining the general peace. Without effective international administration the affairs of the society of states cannot be managed properly ; and an absolutely rigid system of general rules might work more harm than good.

PROPOSITION X.—The system known as International Law, even if reinforced by an effective sanction, would be an inadequate basis of public right.



## CHAPTER XI

### THE INTERDEPENDENCE OF STATES

**N**O society could exist as an organized community in which all the members should be independent. Every social union restrains or qualifies the independence of the associated members. To the extent indeed to which a number of individuals are associated together—to the extent to which they form an organized society—their several independence is forgone.

The true object of a state, as of every other social union, is the enlargement of the freedom of the individual members or their power of realizing their respective wills. This greater freedom of action on the part of the citizens can be achieved only by the exclusion of their independence. Independence is an anti-social conception. It connotes anarchy. Man by virtue of his membership of a civilized community obtains real and substantial liberty at the price of exclusion from the illusive independence of a solitary savage.

“Freedom and independence, though so often confounded, are so far from being identical, that, in human relations, they are not even reconcilable.”<sup>1</sup>

No social organism, moreover, can be evolved

<sup>1</sup> Lorimer's *Law of Nations*, vol. i. p. 2.

without the development of inequalities as between the individual members. The progressive growth of any living organism involves the differentiation of its functions. If it were possible for any nation to persist in maintaining a condition of absolute equality as between all its members individually, such a nation could never become a state. The development of a community of men into a state or political society involves the recognition of inequalities between the members. The establishment of order necessitates relations of superiority and inferiority.

Social order implies, of course, the existence of a society. General rules of conduct can prevail only in proportion to the degree in which those who are to be affected by them approximate to an organized social community.

The influence of International Law can be established firmly only by developing the social relations of states. Only to the extent to which the world evolves the essential characteristics of a social organism can peace be established on a firm and lasting foundation. The society of states must become an active reality before social order can be maintained permanently throughout the world.

When, therefore, the professors of International Law declare that one of its postulates is the independence and equality of states they advance a proposition which is fundamentally inconsistent with the practical development of the system. At the same time they raise the most formidable difficulties in the way of efficient international administration.

Every one recognizes the fact that, normally but

to an undefined extent, it is best that separate states, like separate individuals, should manage their own affairs. The problem of the future is this—how is the autonomy of states—their practical independence with regard to internal government—to be reconciled with the well-being of the world at large considered as a great society of states? How is the sovereignty of states with regard to their internal affairs to be rendered consistent with the interdependence of states as regards the general welfare?

Let us in the first place attempt to form a clear conception of the real position of states in relation to one another.

The world is tending to become as a whole a true society. With the general intellectual and moral advancement of mankind, the improvement of communications between the various peoples, the general diffusion of information upon contemporary events, and the consequent growth of an international public opinion, a real world-society is being gradually evolved. We have seen that, for an indefinite period of the future, the formation of a universal state cannot reasonably be anticipated. But a sense of human solidarity is steadily developing. Already throughout a very large proportion of mankind there is sufficient community of sentiment to form a basis for satisfactory social relations. As between several great nations, indeed, there is now sufficient sympathy and moral similarity to render joint action on their part possible even in long-sustained measures of far-reaching significance. And on the part of the more advanced democracies there appears to be a rapidly growing disposition

to grapple with the affairs of the world as a whole. Already the process of social integration has probably gone farther than is generally realized ; and it seems evident that the elements of cohesion are at the present time in a condition of special activity. It would be unfortunate if statesmen, even with the best intentions, were to retard this beneficent process by attempting to insist upon conditions of state existence which are the negation of social order.

Owing to the rudimentary social cohesion which already exists between the various states they cannot all be independent in fact.

It may, however, be said that each of the Great Powers is, in the ordinary meaning of the words, practically independent. Its absolute strength is great. Its relative strength at any particular time is ascertainable only by war. If attacked, as things have hitherto been, the possibility of combination with other states has had to be taken into account. In the result, no Power is the subject of the direct interference in its affairs of other states, except where war on a vast scale is deliberately contemplated. Accordingly, every Power, so long as it refrains from doing anything which would excite the active hostility of another Power, is free to do what it pleases. As a matter of practical politics there are, therefore, good reasons for the conventional assumption that the Great Powers are respectively independent. These states have in fact, as we shall see later on, acquired collectively a distinctive position as a rudimentary world-organ of direction and control.

Side by side with these Great Powers there exist



a large number of smaller states. Most of these relatively to the Great Powers have practically hardly any power at all. Their separate existence is not dependent primarily upon their own strength. In each case it is due to other causes. *A fortiori* these states cannot maintain the peace of the world outside their own borders. They are not in fact independent, nor can they maintain the independence of other states.

A little state indeed enjoys its separate existence at the inevitable cost of exclusion from direct and substantial authority in the affairs of the world at large.

If we turn to the legal aspect of the matter we are confronted not only with the principle that law, in the strict sense of the term, is inconsistent with independence, but also with the fact that as between states it is conceded that no such law exists. Moreover, with regard to what is called "International Law," we have seen that usage does not recognize the independence of small states. On the contrary, the habitual conduct of the Great Powers with regard to them is inconsistent with any assumption of such independence.

Can it then be maintained that, as a matter of right or morals, every little state ought to be independent? or rather, that, by common consent, it should be treated as if it were independent?

Every community which is organized as a political entity; which possesses a defined territory; and which manages its own affairs apart from any external control regularly exercised over it by any other particular community, is a state. As such it is entitled, according to the general view of

mankind and what appears to be the essential justice of the matter, to freedom of action, so far as this is consistent with the welfare of other states. But the attempt to assure to every state absolute independence would hinder the development of the social organization of the world as a whole which is a necessary condition of the maintenance of general order and the permanent preservation of peace.

The theory of the equality of all states rests upon no better foundation either of fact or principle than that of their independence.

"All states are equally entitled to be recognized as states, on the simple ground that they are states ; but all states are not entitled to be recognized as equal states, simply because they are not equal states."<sup>1</sup> Any attempt to establish an artificial equality must tend in the long run to the aggravation, rather than to the mitigation, of the inequality which exists in fact.

The prevalence of this dogma of equality, like that of independence, seriously obscures the essential features of the real position occupied by the smaller states and the conditions upon which their tenure of separate existence has long depended ; and may also prove an obstacle in the way of the future developments by which alone their interests can be adequately secured.

Writers on International Law have, indeed, recently manifested an increasingly decided disposition to take this view of the dogmas in question.

"The equality of sovereign states," said Dr.

<sup>1</sup> Lorimer's *Law of Nations*, vol. ii. p. 260, note.

Westlake,<sup>1</sup> "is merely their independence under a different name. We are here irresistibly reminded of the existence in Europe of the great powers as a separate and recognized class, and are led to ask whether it can be reconciled with the equality and independence which international law deems to belong to the smaller powers. . . . We are in presence of the first stages of a process which in the course of ages may lead to organized government among states, as the indispensable condition of their peace. . . . The world in which the largest intercourse of civilized men has been from time to time carried on has not always been distributed into equal and independent states, and we are reminded by what we see that it may not always continue to be so distributed."

Similarly but more emphatically Dr. T. J. Lawrence says:<sup>2</sup> "An examination of modern international history reveals a number of facts which it is hard to reconcile with the old theory of the complete equality of all fully sovereign states. They seem instead to point to a primacy on the part of the foremost powers of the civilized world. . . . Attempts are made to reconcile them with the doctrine of the equality of all sovereign states by pointing out that what they establish is a political inequality, whereas what the old theory asserted was a legal equality. It is a grave question whether the legal and the political aspects of the problem can be parted and kept separate in this way. . . . In a system of rules depending, like International Law, for their validity on general

<sup>1</sup> *International Law*, pt. i., "Peace," pp. 321-3.

<sup>2</sup> *Principles of International Law*, 4th ed. pp. 268-88.

consent, what is political is legal also, if it is generally accepted and acted on. . . . There is no moral or jural necessity about the doctrine of equality. . . . May not international society be organizing itself to-day on lines inconsistent with that absolute equality in all things which still seems to some statesmen and publicists almost a sacred dogma ? ”

In short, the theories of the independence and equality of all states are inconsistent with the principles of the evolution of a world-society ; and any efforts to insist upon their application in practice would accordingly tend to impede the development of the conditions which are necessary to the establishment of peace.

PROPOSITION XI.—The process of coalescence whereby the world is developing into a social community involves inequalities between the several states and excludes the possibility of the complete independence of all.



## CHAPTER XII

### INTERNATIONAL ADMINISTRATION

**I**N every organized society order is preserved and the common well-being of the members maintained by general rules and occasional or particular ordinances. For the most part the general rules are prescribed by custom, law, and the social imperative ; while the occasional or particular commands emanate from administrative authority and public opinion.

Rules, which are the formulation of general principles, cannot cover the whole area of social conduct. Even in the most highly developed state, notwithstanding all the accumulated experience of a thousand years or more of collective life, the action of individuals has from time to time to be constrained by particular commands relating to specific matters. Discretionary administration by means of official orders issued *ad hoc* is the necessary complement of the law and the judicature. And in the earlier stages of social development the area of administration, relatively to that of general rules applying to acts of a class, is still larger than it is in the case of an advanced community. The relative importance, indeed, of administration, as compared with the enforcement of general rules,

is at its maximum in the earliest stage of social order and diminishes as social integration proceeds.

Accordingly the affairs of the world considered as a whole could not be regulated satisfactorily in reliance upon general rules alone. The society of states is still in a rudimentary condition, and the scope for administrative activity in its affairs is therefore correspondingly wide. But, even if the process of social integration had gone much farther than it in fact has, the world of states would still need for its complete regulation the occasional ordinances of administrative authority. Only indeed by such intervention could the outbreak of war from some of the causes indicated in Chapter II be provided against with certainty.

Hitherto this aspect of world politics has never received adequate recognition and attention. It has indeed been thoroughly obscured by the postulates of International Law derived from the imaginary Law of Nature and their logical consequences. The doctrines of the independence and equality of all states involve the correlative doctrine of an obligation incumbent upon every state to abstain from intervention in the affairs of any other. Accordingly, this obligation of non-intervention has been persistently said to be prescribed by International Law. Such an obligation, if it existed, would of course exclude the very conception of the administrative action which we are considering in the present chapter.

In fact, however, intervention by one or more states in the affairs of others has frequently taken place throughout all historical times. The instances indeed of such action are so numerous, and many

of them from the moral standpoint are so obviously praiseworthy, that writers on International Law have undertaken the difficult task of attempting to reconcile the recorded facts with their theory by developing an ever-increasing list of categories of exceptions to its assumed general applicability. But, while they still cling tenaciously to the letter of the general theory, one may easily discern in their writings the dawn of the recognition of the true and practical principle.

Thus the late Mr. W. E. Hall, dealing at length with the subject in his treatise on *International Law*, puts forward the following conclusions: "The grounds upon which intervention has taken place, or upon which it is said with more or less of authority that it is permitted, may be referred to the right of self-preservation, to a right of opposing wrongdoing, to the duty of fulfilling engagements, and to friendship for one of two parties in a state. . . . It is unfortunate that publicists have not laid down broadly and unanimously that no intervention is legal, except for the purpose of self-preservation, unless a breach of the law as between states has taken place, or unless the whole body of civilized states have concurred in authorizing it."<sup>1</sup> It is not difficult to infer from this statement of the conclusions of a very learned and careful author that no valid rule upon the subject has ever existed. And the germ of the true principle at which he hints in the concluding words of this passage is more fully indicated by him elsewhere in these terms: "A somewhat wider range of intervention than that which is possessed by individual states may perhaps

<sup>1</sup> *International Law*, 6th ed. pp. 279, 284.

be conceded to the body of states, or to some of them acting for the whole in good faith with sufficient warrant." <sup>1</sup>

And Dr. T. J. Lawrence in his work on *The Principles of International Law* says: "A doctrine of absolute non-intervention has been put forth as a protest against incessant meddling. If this doctrine means that a state should do nothing but mind its own concerns and never take an interest in the affairs of other states, it is fatal to the idea of a family of nations. If, on the other hand, it means that a state should take an interest in international affairs, and express approval or disapproval of the conduct of its neighbours, but never go beyond moral suasion in its interference, it is foolish. To scatter abroad protests and reproaches, and yet to let it be understood that they will never be backed by force of arms, is the surest way to get them treated with angry contempt. Neither selfish isolation nor undignified remonstrance is the proper attitude for honourable and self-respecting states. They should intervene very sparingly, and only on the clearest grounds of justice and necessity; but when they do intervene, they should make it clear to all concerned that their voice must be attended to and their wishes carried out." <sup>2</sup>

When we examine the actual course of modern history we find that intervention of an administrative character has in fact very largely contributed to the maintenance of international order. To speak only of the period since 1815, the Great Powers have in practice assumed, and to a consider-

<sup>1</sup> *International Law*, 6th ed. p. 287.    <sup>2</sup> 4th ed. pp. 137, 138.



able extent exercised, the authority to regulate the positions of the smaller states. It is sufficient in this connexion to refer, by way of illustration, to the instances of the action of the Powers mentioned in various parts of this treatise, and particularly to the action of the Concert of Europe as stated on pages 79-81 above, and of the United States of America with regard to the affairs of the Central and South American Republics.

It is, indeed, evident that the administrative acts by which the Powers have exercised their authority have in many instances been far more effectual in allaying strife than would have been an insistence in the cases in question upon the application of any principles of International Law.

Action similar in its nature will be necessary in the future. Many cases will occur in which the peace will be threatened in consequence of difficulties arising between particular states, where the mere judicial application of any pre-existing general rule would be either impracticable or ineffective, and where rigid insistence upon the *status quo* would involve evils of the gravest character.

Thus, as we have already seen, from time to time, owing to the effects of the spirit of nationality and the operation of other natural causes, certain readjustments of territorial boundaries and rights of jurisdiction become urgently required. It may be, for example, that the limits of particular states have to be brought into a certain correspondence with national areas; or the means of access to the sea, or a right of passage over part of a river, have become essential to the proper development of the economic life of a state whose

population is rapidly increasing. Hitherto changes necessitated by natural causes such as these have generally been accomplished only at the cost of war.

A code of public right which purports to render all existing territorial arrangements and sovereign powers for ever unalterable except with the consent of the states affected and excludes the application of administrative discretion to the solution of difficulties arising from the causes in question, cannot permanently command the full approval of mankind. Nor could it be upheld by any available sanction. The forces of nature at work among the great families of men must in the long run secure their appropriate results. Accordingly, existing boundaries will be altered and territorial rights will be modified, in ways and upon occasions which cannot now be foreseen in detail, notwithstanding the disapproval and opposition of states which may conceive that their own interests will be prejudiced thereby. And, so long as the possibility that a state may have good grounds for a claim to such an alteration is left entirely unrecognized by the standard of Public Right, there will always be the risk that such claims may provoke inevitable and disastrous strife. More than this, exorbitant ambition and unscrupulous greed will find in this omission the pretext for wholly wanton and unwarranted aggression.

The code of Public Right must then, it is conceived, be modified so as to recognize the necessity for occasional territorial re-arrangements; it must admit that circumstances of the kind in question may constitute a valid title; and it must provide the machinery for effecting the proper change.

A useful analogy is to be found in the laws and systems of procedure of modern states. Within the borders of most civilized countries, speaking generally, individual ownership of land is recognized and protected by the law. Under ordinary circumstances no one may annex or even enter the close of another. But where it is shown that, in the general interest of the inhabitants, it is desirable that any particular piece of land belonging to one of them should be compulsorily taken from him by a local authority or a public company, or that an easement in their favour should be created over it, this may be accomplished by virtue of the joint operation of certain general laws and of particular administrative ordinances.

It is noteworthy, moreover, that the power of dealing with land apart from its owner's consent is continually being extended with the advance of civilization. The rights of the former owner have hitherto been recognized for the most part by the award of adequate, or as some would say excessive, compensation. But, even in this respect, the regard for the individual is diminishing while that for the community is increasing.

Similarly, when the general interest of the society of states—the peace and progress of mankind—requires that a portion of the territory of one state should be transferred to another, or that a right of access to the sea should be obtained by one state over the territory of another, it would seem that the justice and propriety of the change should be recognized by international polity.

The reasons, indeed, for giving effect to the requirements of the common weal are more cogent



in the case of the society of states than in that of the citizens of a particular state. Owing to the relative difficulty of restraining a tendency to self-redress on the part of states as compared with that of restraining such a tendency on the part of the citizens of a well-ordered community, it is of more urgent practical importance to avoid reasonable ground for dissatisfaction in the former case than in the latter.

It may well be that a practical difficulty may exist as to the matter of compensation in the circumstances contemplated. On the other hand, there will be a general recognition of the principle that, in any territorial re-arrangements, due regard must be paid to the welfare of all the peoples concerned. It seems, indeed, to be probable that the solution of most territorial questions will in practice be very largely assisted by the general development of democratic institutions and the growth of the feeling that *primâ facie* the inhabitants of any portion of the surface of the globe are entitled to have effect given to their wishes as to the particular political unit in which they are to be comprised.

A greater difficulty arises as to the machinery whereby the rights of the states concerned are to be adjusted. At the present stage of our inquiry it is sufficient to say in this connexion that, whatever is to be the authority on which mankind are to rely for the prevention of war—be it a permanent or periodical Congress of the Powers or a Council constituted by a League of Peace—to that authority a state should be at liberty to apply for an award of the kind suggested.

Many no doubt will in the first instance depre-



cate the making of such awards altogether. Let it therefore be considered that the substance of the proposal amounts only to this—that changes of a kind which have hitherto been effected by occasional Congresses, or by the Concert of Europe, partially and crudely, and generally only after much bloodshed and suffering, and which it is certain must be effected in the future by some means or other, should be accomplished peaceably, justly, and with due consideration for those primarily concerned as well as for the welfare and order of the society of states at large.

The scope for administrative action is further considered in Chapter XV.<sup>1</sup>

It is now of great practical importance to recognize the fact that those who have hitherto directed their attention to the problem of the maintenance of peace have for the most part placed far too much reliance upon the possible developments of the system of International Law and the arbitral or judicial settlement of disputes in accordance with its provisions. It is high time that the truth should be generally appreciated and frankly admitted that the peace and welfare of the world cannot be maintained without the exercise from time to time of administrative authority. The organization of the world as a whole cannot be developed adequately into a really social structure unless its common interests are the subject of a control which is collective in its nature. The theory of the absolute independence of all states and the corollary of the duty of non-intervention are inconsistent with the principles of social order and must accordingly be disregarded.

<sup>1</sup> See pp. 179–82 *infra*.

This being so it follows that it is necessary that there should be a universally recognized authority in every way qualified to act on behalf of the society of states as a whole, and always available when the need for its intervention may arise.

In this connexion it will be borne in mind that as social integration proceeds administration tends to become progressively more limited by general rules. It remains for international administrative law to be developed in the future. Meanwhile a constant regard for the general welfare and deference to the social imperative and public opinion will go far to supply the want of more specific guidance.<sup>1</sup>

PROPOSITION XII.—In order that peace may be maintained administrative action is as necessary as insistence upon general rules in the society of states.

<sup>1</sup> An International High Court of Justice is theoretically an essential part of any universal social structure. But, as a matter of fact, the constitution of such a Court is not now a matter of urgent practical necessity. Already the means are provided whereby disputant states may obtain the decision of an impartial tribunal, and these means will almost inevitably be improved until they command general confidence. Any state which should believe that, in pursuance of a recognized principle of International Law it had a claim against another state, the satisfaction of which it could not obtain by diplomatic means, would now naturally submit its claim to judicial determination. If, instead of doing this, it declared war, the world at large would disapprove its action, and any authority charged with the preservation of peace would treat it as a ground for the exercise of such coercive force as was available. Accordingly, while it is clear that, if any kind of central authority be set up, it would naturally be invested with judicial functions as a tribunal of ultimate resort in case its services in this respect were required, it would be altogether misleading to suggest that an International High Court *per se* is in any sense a special need of the moment.

## CHAPTER XIII

### RIGHT AND MIGHT

SOME obscurity of thought as to the relation between right and might is still widely prevalent.

Right and might are obviously very different things. But there is no natural or necessary opposition between them.

Every one understands what might is. Most people understand, for the immediate practical purposes of their lives, what right is.

The ultimate object of all moral wisdom is to elevate mankind at large to a state in which every one, in pursuance of the guidance of his own conscience, will do what is right—will willingly concede to others the same freedom of action that he desires for himself—will do to others what he would wish them to do to him. In this, the ideal condition of society, right would prevail universally by virtue of the goodwill of all. It would be adequately supported by the general moral sense. Might would never be applied so as to contravene right. No might would be necessary, therefore, for the active support of right.

Up to the present time, however, a very large proportion of mankind fall far short of this ideal

moral attitude. They cannot be trusted always to respect right for its own sake. Accordingly, in order that there may be a reasonable certainty that right shall prevail, it must be enforceable : the power of securing its observance by force if necessary must reside in those who are prepared to act in its support. The existence of the right, in the sense of moral (as distinguished from legal) right, is entirely independent of might ; but the enforceability of right is wholly dependent upon might. Right when opposed by might is in itself utterly powerless.

The use of phrases which imply that right is in itself a power is due partly to a tendency to the employment of metaphorical or elliptical language. It is commonly observed that a person or nation who assert a right often prevail against apparently overwhelming or preponderant forces arrayed in opposition to them. The facts of course are that, owing to the moral advancement already achieved by the race, people who believe they are fighting for right very commonly fight better—in other words, use more force—than those who are not animated by this motive ; and they also attract to their support other people or nations who are anxious to see right prevail.

Nothing, however, can be clearer than that might can be overcome only by greater might. When right is opposed by might it can prevail only if preponderating might is brought to bear in its support. Moral teaching may induce the mighty to refrain from exercising their might in contravention of right ; but nothing save greater force can ever have supremacy over force.



One would naturally have thought that the Great War would have rendered these propositions so obvious that their statement would be unnecessary. For when once the might of the Central Powers invaded Belgium nothing but the opposition of an equal or greater might could possibly have maintained the right of that country. Nevertheless, even during the continuance of the stupendous struggle, much has been said about the necessity of establishing for the future the supremacy of right over force. And expressions such as these, however they may be understood by those who use them, are apt to prove the source of deplorable confusion in the minds of others.

The proper object of all men of goodwill is to ensure that right should be supported by as much might as is possible or necessary for its enforcement. Speaking generally of all mankind, whether considered as individuals or as associated in communities, it may be said that their immediate practical aim should be (1) to induce as many people as possible voluntarily to refrain from forcibly contravening the rights of others, and (2) to induce as many people as possible to be ready and willing to bring their might to bear against the might of any who may threaten or actually violate the rights of others.

“Violence and injustice shall be mastered by the sovereign alliance of force and right.”<sup>1</sup>

This is of cardinal importance as applied to our present subject.

In preceding chapters we have dealt with the development of moral forces. We have seen that,

<sup>1</sup> M. Poincaré at Gonesse on 7 October 1915.

while there are solid grounds for believing in the increasing efficacy of these forces in preventing wars, for many years to come it will not be safe to rely on them alone.

We are now engaged upon a different phase of the subject. Right in itself being powerless against might, we have to consider the means of preventing wars by force. Accordingly, we must concentrate our attention for the time being on might. The problem is how to secure that a preponderance of might shall be on the side of those who wish to uphold the right.

PROPOSITION XIII. — Right is secure against the might of wrongdoers only if it is itself supported by the greater might of others.

## CHAPTER XIV

### THE DUTY OF INTERVENTION

**I**N order that the conduct of states may be effectively regulated and the peace of the world as far as possible assured, three things are necessary :

1. A considerable development of the general will of the society of states as a collective whole—a development resulting not only in well-defined and universally accepted customs and conventional rules, but a genuine international social imperative and a vigorous, alert, and articulate public opinion.

2. The establishment of an administrative authority capable of dealing *ad hoc* with particular difficulties arising in the society of states which do not admit of solution by the application of any generally accepted rule.

3. The constitution of a standing probability that a state which disturbs the peace by acting in violent contravention of the general will of the society of states will suffer evil consequences at the hands of some power or powers acting on their behalf.

We have now to deal specifically with the third of these conditions. In order that this may be attained it is necessary that there should be on the part of the states of goodwill and their peoples a realization and recognition of their joint and several

responsibility for the preservation of the general order and of the consequent duty incumbent upon them all alike of doing everything in their power to prevent any state or states from waging an unjust and aggressive war. Unless it be reasonably certain that, if any particular community be attacked, others will be ready to take active parts in the war against the aggressor, there can be no standing probability that a delinquent state will be defeated in its object or punished for its conduct.

Hitherto no such duty has been generally recognized. The idea indeed of every state intervening, or being conditionally bound to intervene, in every war would have been almost inconceivable until comparatively recent times. And even now there will be many minds which will honestly and intelligently arrive at the conviction that, when war occurs, the great desideratum must be to limit the area of hostilities, and that, on the whole, the general interests will be best served by each state confining its active operations to matters which are its own direct and immediate concern. Moreover, quite apart from the conclusions of reason there will be a strong disposition on the part of many states to avoid participation in strife from self-regarding motives, based on considerations of a proximate character, instead of the wider consideration of the general and lasting welfare of the world at large.

It may, however, be contended with great cogency that the system of International Law, in so far as it purports to be obligatory upon states, involves the implication of the suggested duty of intervention. If no state, other than the immediate parties to a controversy, is concerned therein,



International Law can have no semblance of a sanction. Unless a breach of the rules of this system casts some obligation upon states which are not directly injured thereby, the system must tend to be regarded rather as a pretence than a reality ; or, perhaps worse still, as an actual restraint upon well-disposed states only, and, therefore, not improbably a disadvantage to them in their relations to other states.

The germ of the conception of the several and collective responsibility of states for forming a judgment upon the merits of a particular dispute and acting accordingly is really to be found in the treatise of Grotius himself.

"It is," says he, "the duty of neutrals to do nothing which may strengthen the side which has the worse cause, or which may impede the motions of him who is carrying on a just war . . . and in a doubtful case to act alike to both sides in permitting transit, in supplying provisions, in not helping persons besieged."<sup>1</sup> And speaking of the supply by a neutral to an enemy of objects of ambiguous use, after saying that the state of the war is to be considered, Grotius adds : "If, besides, the injustice of my enemy to me be very evident, and he " (the neutral) "confirm him in a most unjust war, he will then be bound to me not only civilly for the damage, but also criminally as being one who protects a manifest criminal from the judge who is about to inflict punishment."<sup>2</sup>

<sup>1</sup> *De Jure Belli et Pacis*, Whewell's translation, bk. iii. cap. xvii. sect. iii. 1.

<sup>2</sup> *Ibid.* bk. iii. cap. i. sect. v. 3. See also bk. i. cap. v. sect. ii. ; bk. ii. cap. xv. 13 ; bk. ii. cap. xx. sect. xl. ; bk. ii. cap. xxv. sect. vi.

After the time of Grotius, however, jurists and statesmen elaborated the doctrines of neutrality in such a way and to such an extent as to undermine, and indeed very largely to destroy, the authority of the international system. While ingeniously developing the supposed implications of neutrality, they overlooked the cardinal implication of any system of International Law that neutrality is not normally a moral attitude.

The obligations of neutrality, as set forth by the writers on the subject, are, it is to be observed, the obligations of a state which wishes to keep out of a war towards the actual belligerents. The obligation with which we are now concerned is the obligation of every state to the society of states as a whole. If such an obligation exists it must obviously transcend all others.

The narrow and self-regarding view of neutrality was prominently enunciated by Bynkershoek in 1737. The duty of neutrals, he said, "is to use all care not to meddle in the war: . . . If I am neutral, I cannot give an advantage to one party, lest I injure the other. . . . It is more essential to remain in amity with both than to favour the hostilities of one and so make a tacit renunciation of the friendship of the other." Even this writer, however, had some conception of the higher aspect of the matter. When, for example, he discusses the position of a neutral who is under an obligation by treaty to furnish help to one who has afterwards become a belligerent, he says that the neutral may abstain from rendering the promised assistance where the war has been undertaken unjustly on the part of the state to which it had been promised.<sup>1</sup>

<sup>1</sup> *Quæstiones Juris Publici*, bk. i. cap. ix.

The United States of America did much to develop and elaborate the body of usages and rules based upon the supposed duty of neutrals to abstain from acts calculated to assist either of the parties to a war. Their policy in 1793 constituted "an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinions as to what those obligations were ; and in some points it even went further than authoritative international custom " had advanced up to the time of the Great War.<sup>1</sup>

The traditional policy of the Republic in regard to this subject no doubt accounts very largely for its attitude during this war until the spring of 1917. But by the declaration of hostility which it then made against Germany the last serious obstacle to the development of a sound international system was removed. Henceforth, it is conceived, the importance of the doctrines of neutrality must steadily diminish.

It may well be that, in most of the wars that occurred down to the year 1914, the states which remained "neutral" were well advised in maintaining an attitude of impartiality, and also that the rules which were from time to time established with regard to the extent of the obligations of neutrals to abstain from assisting a belligerent had on the whole a beneficial effect. Until comparatively recent times the difficulty of judging upon which side the greater blame might be due for the outbreak of war would often have been

<sup>1</sup> Hall's *International Law*, 6th ed. p. 587.

insuperable. The desirability of restricting the area of strife was, moreover, properly a dominant consideration: for the world at large was so far from being in any sense a real society that the intervention of a third party in a particular war would not usually have borne any perceptible relation to a definite system for the preservation of general order.

The aspect of neutrality is now, however, radically different. The world as a whole has become an inchoate social organism. Its constituent communities are beginning to realize their essential solidarity. The knowledge of one another's affairs is leading to the formation, on the part of men collectively, of an international opinion. The common interests of all are beginning to be appreciated by each. If the peace be broken hereafter it will be natural for the citizens of every state to feel the necessity of forming a moral judgment upon the merits of the case and of shaping their own course accordingly.

The claims of self-regarding prudence, moreover, must henceforth yield to the demands of duty to the society of states at large. The preservation of peace is the common interest of all; and peace can be preserved permanently only if states which are not immediately concerned in any threatened strife are nevertheless willing to participate therein for the sake of the general welfare. The title to peace can be earned only by the readiness to share in the burden of securing it. The common interest of all is the foundation of a common duty.

Every state ought therefore to be willing to co-operate in the forcible measures necessary for the



maintenance of order. It does not necessarily follow that, whenever hostile measures are anywhere threatened, the whole world should spring to arms. But, in order to provide an effective sanction to peace, by establishing a standing probability that any attempt to disturb it will be defeated, there must be a general and active recognition of the principle that every state ought to be willing to do its best, according to circumstances, to contribute to the success of the champions of interstatal order. Peace can be established upon firm foundations only in accordance with principles which would exclude the right of any state to maintain an attitude of neutrality in the event of war.

PROPOSITION XIV. — Every state is morally bound to co-operate with other states in maintaining public right and preserving the general peace.

## CHAPTER XV.

### A LEAGUE OF PEACE

**P**EACE is the common interest of the entire world. In order that it may be preserved, appropriate administrative action must from time to time be taken on behalf of the society of states, and adequate forces must be available for the prevention or termination of hostilities.

Accordingly, at the stage of the discussion which we have now reached, the practical problem before us assumes this form—how is the world to make provision that such action shall be taken and such forces shall be available as may be necessary for the preservation of peace?

#### SECTION I

#### THE DISPOSITION TOWARDS CONFEDERATION

The tendencies in the direction of the peaceful settlement of international disputes which had been steadily increasing up to the month of August 1914 have been greatly accelerated in consequence of the impression made upon the minds of all civilized men by the events which have since occurred.

War, as it must henceforth be waged by great states, if waged at all, is perceived to be a struggle in which the entire manhood and resources of the belligerents are locked in a deadly grip. Its horrible evils have been brought home to all the living inhabitants of the most advanced countries with appalling and decisive force. It is now obvious to every one that hardly any object, except the preservation of civilization or of national existence, can be worth pursuing at the cost of such a war. Martial glory for its own sake no longer fascinates the imagination of mankind. The very children of the nations will shrink with terror from its associations. Civilized people all over the world are bent upon having peace in their own time, and they would like to feel that provision had been made to secure it for their descendants too. They are accordingly prepared to adopt the measures which may appear to them best calculated to afford this security.

The War has also had a vast effect in developing the organism and features of a world-society. It has quickened and intensified the process of social integration throughout by far the greater part of mankind. The fact that a dispute between Austria and Serbia led to a war, in which all the Powers as well as many minor states became involved, has most forcibly demonstrated the community of interest which now unites the different peoples of the earth. It has become manifest that all races are in reality members of one body, and that all are concerned in the welfare and the sufferings of each. Moreover, by the solidarity of the Allies with regard to the objects which they have

so long pursued together, as well as by the suffering and sorrows which they have borne in common, relations which are essentially social have been developed to a high degree between most of the greatest states and nations. In the result, there is a strong tendency towards a general belief in the possibility of collective action with the object of preventing wars in the future.

Accordingly, the desire for peace which formerly was felt in varying strength by an ever-increasing number of thoughtful people throughout the world is now hardening into a mandate of the general will of civilized mankind that, as far as practicable, wars shall be prevented.

“The combined impulses which work through political agencies can, in the absence of such agencies, produce others through which to work.”<sup>1</sup> In any society of men where law does not prevail, there are generally to be found influential men ready to take the initiative in rallying the forces of order, and sufficient good sense on the part of others to support them effectively, in the suppression of violent wrongdoing. In the wider society of states it is by no means impossible that analogous conditions may be developed.

A very great power, the British Empire, has recently, from the outbreak of hostilities, waged war for the proximate object of maintaining the general welfare of the society of states. By this great example it has prepared the way for the general acceptance of the principle of the several and collective responsibility of all states for the preservation of the general peace.

<sup>1</sup> Herbert Spencer's *Principles of Sociology*, vol. ii. p. 330.



In one aspect, moreover, the magnitude of the task which has to be accomplished will be found upon close examination to be less than at first sight it appears to be. It is not necessary to bring 1700 millions of people or even 50 states into a common agreement. We shall presently see that if eight governments can be induced to act together the peace of the world will be secured.

At the same time, the novelty of the proposal to bind these Powers for the future in a League of Peace is more apparent than real. The Congresses of the European Powers which have met from time to time for centuries, and the Concert of Europe since 1815, have performed work which, although only occasional in character, as well as often inadequate and defective, was essentially similar both in respect of its objects and its methods to that which would be entrusted to the Alliance which is now suggested.

## SECTION II

### THE CONCEPTION OF A LEAGUE

Before dealing directly with the form which an organization for the maintenance of peace should take, it will be well to consider briefly the ways in which the conception of such an organization has been presented by some of the most celebrated thinkers who have from time to time applied their minds to the subject.

In the *De Jure Belli et Pacis* of Hugo Grotius there is one passage of vital interest and importance in this connexion. Treating of compromise or

arbitration as one of the ways in which controversies may be prevented from breaking out into wars, and after observing that "especially are Christian kings and states bound to try this way of avoiding war," he says: "Both for this reason and for others, it would be useful, and indeed it is almost necessary, that certain Congresses of Christian Powers should be held, in which the controversies which arise among some of them may be decided by others who are not interested; and in which measures may be taken to compel the parties to accept peace on equitable terms."<sup>1</sup>

This, in the opinion of the present writer, is the golden sentence of the illustrious jurist. It contains in itself the germ and essential characteristics of the one and only scheme which bears any real promise of peace to mankind in general. One is tempted to wonder why Grotius himself did not accord to this suggestion a greater prominence than it in fact has in the system which he elaborated with so much patience and zeal.

The scheme which was given to the world in 1713 by the Abbé de Saint-Pierre was supposed to have been expanded from a plan prepared by the Duc de Sully and attributed by him to Henry IV of France. In Wheaton's *History of the Law of Nations*<sup>2</sup> this scheme<sup>3</sup> is thus summarized: "The first article of the *projet* proposed to establish a perpetual alliance between the members of the European league, or Christian republic, for their mutual security against both foreign and civil war, and for the mutual guarantee of their respective

<sup>1</sup> Whewell's translation, bk. ii. cap. xxiii. sect. viii. 3, 4.

<sup>2</sup> Pp. 261-3.

<sup>3</sup> As developed in 1729.

possessions, and of the treaties of peace concluded at Utrecht. The 2nd article proposed that each ally should contribute to the common expenses of the grand alliance a monthly contribution to be regulated by the general assembly of their plenipotentiaries. The 3rd article provided that the allies should renounce the right of making war against each other, and accept the mediation and arbitration of the general assembly of the league for the termination of their mutual differences, three-fourths of the votes being necessary for a definitive judgment. The principal sovereigns and states who were to compose the league," to the number of nineteen, were arranged in a certain order of precedence. "Each of these nineteen powers was to have a single vote in the European diet, and the smaller republics and princes to be associated in the league, with the right of giving a single collective vote. . . . The 4th article stipulated that if any one of the allied Powers should refuse to carry into effect the judgments and regulations of the grand alliance, or negotiate treaties in contravention thereof, or prepare to wage war, the alliance should arm and act offensively against the offending Power, until it was reduced to obedience. The 5th article declared that the general assembly of plenipotentiaries of the alliance should have power to enact by a plurality of votes all laws necessary to carry into effect the objects of the alliance; but no alteration in the fundamental articles was to be made without the unanimous consent of the allies."

This citation is sufficient to show that St. Pierre, like Grotius, had a firm hold upon the root of the

matter ; and it is unnecessary to refer in this place to the criticisms, many of them of obvious validity, which have been freely passed upon the details of his scheme by Leibniz, Voltaire, Rousseau, and others.

A careful study of the writings of Kant, so far as they bear upon the present subject, makes it clear that the views of this philosopher as to the best means of maintaining peace underwent some fluctuation. His final opinion, however, appears to be expressed in the *Metaphysics of Jurisprudence*, published in 1797, as follows:<sup>1</sup> "The establishment of perpetual peace, which ought to be considered as the ultimate object of every system of public law, may perhaps be considered as impracticable, inasmuch as the too great extension of . . . a federal union might render impossible that supervision over its several members, and that protection to each member which is essential to its ends. But the establishment of those principles which tend to further this object, by forming such alliances between different states as may gradually lead to its accomplishment, is by no means an impracticable idea, since it is grounded upon the rights and the duties of men and of states. Such a general association of states, having for its object the preservation of peace, might be termed the permanent congress of nations. Such was the diplomatic conference formed at The Hague during the first part of the eighteenth century, with a similar view, consisting of the ministers of the greater part of the European Courts and even of the smallest republics. In this manner all Europe was constituted into one federal state, of which the

<sup>1</sup> See Wheaton's *History of the Law of Nations*, p. 753.



several members submitted their differences to the decision of this conference as their sovereign arbiter. . . . What we mean to propose is a general congress of nations, of which both the meeting and the duration are to depend entirely on the sovereign wills of the several members of the league, and not an indissoluble union like that which exists between the several states of North America founded on a municipal constitution. Such a congress and such a league are the only means of realizing the idea of a true public law according to which the differences between nations would be determined by civil proceedings as those between individuals are determined by civil judicature, instead of resorting to war, a means of redress worthy only of barbarians."

It thus appears that Grotius, St. Pierre, and Kant—the noble-minded jurist, the enthusiastic visionary, and the profound philosopher—all alike grasped the essential truth that *wars can be prevented only by the administrative action of the representatives of separate states acting collectively after deliberation in a common council.*

### SECTION III

#### THE FUNCTIONS OF THE POWERS

In applying the wisdom of the past to the problem presented by the society of states to the present generation we must bear in mind a fundamentally important change in the aspect of world politics which has occurred in comparatively recent times.

From the commencement of the Middle Ages down to the latter half of the nineteenth century, it is probable that most thinkers believed that the tendency of Europe and the rest of the world was towards a society of numerous separate states which would gradually become increasingly similar to one another in respect of population and power. Disintegration seemed to be the destiny of the larger empires and republics. Thus, to refer only to comparatively modern events, the separation from Great Britain of the North American colonies which became the United States of America, and that of the Spanish and Portuguese colonies in South America from their mother countries, were generally regarded as natural and inevitable occurrences. More recently the United States themselves were seriously threatened with disruption; while throughout the British Empire it was very commonly assumed that Canada, Australia, and others of its constituent communities would in course of time become independent republics.

The actual course of events during the last half-century has, however, manifested a trend entirely opposite to that which had thus been believed to exist. Great states, instead of being resolved into the smaller communities from which they have been built up, have become greater and larger than ever. The United States, so far from suffering disruption, have enlarged their dominions by the acquisition of possessions overseas. The connexion between the United Kingdom and the other parts of the Empire is strengthening into an indissoluble union. British citizens, in whatever quarter of the globe they live, with one accord now

contemplate the continued existence and increasing greatness of their commonwealth, which is already by far the largest and most influential social aggregate which has ever been formed by men. The processes of political consolidation and territorial expansion are also observable in the recent history of all the rest of the Great Powers of the world.<sup>1</sup>

The practical aspect of the problem as to the best means of preserving peace has thus been materially changed. The jural principles and the administrative machinery which would have been appropriate in a world divided with approximate equality between all its separate states are inapplicable to, and would be ineffective in, the world as it now actually exists. The facts must be accepted as they are found to be, and any new international arrangements must be conceived accordingly.

Looking backward we perceive that mankind considered in the aggregate have already made vast progress towards universal order and peace, and that this achievement has for the most part been due, so far as political arrangements are concerned, to the comprehension of the majority of the race within a comparatively few great states, rather than to the recognition by the several states of equal rights on the part of each against all the others under a common international system. The progress of the world has in fact been by the way of the building up of great political unions, rather

<sup>1</sup> Mr. A. V. Dicey, indeed, writing in 1910, went so far as to say: "The day of small states appears to have passed. We may regret a fact of which we cannot deny the reality. Great empires are as much a necessity of our time as are huge mercantile companies" (*Law and Opinion in England*, p. 453).

than by that of the practical recognition of the equal rights of all states regardless of their size.

There are still, it is true, over fifty separate states with more or less free and uncontrolled governments of their own. But of the 1734 million people, or thereabouts, who constitute the total population of the globe, about 1450 millions, or five-sixths of the whole, are governed by the sovereign authorities of the eight Powers<sup>1</sup> and China. The smaller states, to the number of about forty-four, between them govern some 284 millions, or one-sixth of the whole. Thus, while the average population of the eight Powers and China is 161 millions, and that of the Powers without China about 131 millions, that of the smaller states is about  $6\frac{1}{2}$  millions. The average population of these states is therefore one-twenty-fifth of that of the nine large states, or one-twentieth of that of the Great Powers. If, further, we set aside, for the purpose of the comparison, the populations of the seven states which in size come next after the Powers, and which amount in the aggregate to 164 millions, the disparity becomes correspondingly more striking. Thirty-seven states are then left with an average population of  $3\frac{1}{4}$  millions.<sup>2</sup>

<sup>1</sup> It is not necessary, or indeed practicable, for the purpose of the present argument, to attempt to take account of contemporary events in Russia.

<sup>2</sup> The numbers of the populations in some parts of the world are not really known. As to that of China, to take an important illustration, there appears to be far-reaching uncertainty. And in the case of certain communities there is room for doubts as to whether they should be considered separate states or not. Moreover, no account has been taken of the changes produced by the war. Accordingly the figures given above are only approximately accurate.



The Powers excel the smaller states in strength to a degree corresponding to the difference between them in respect of population ; while China, in view of its present comparatively modest standard of external efficiency, may perhaps for the present purpose almost be left out of account in a review of the distribution of power throughout the world.

We have seen that the six European Powers have occasionally—or perhaps it would be more accurate to say habitually—exercised a controlling authority over the smaller states of Europe. In recent times there has been a tendency on the part of the United States to exercise a similar authority with regard to the affairs of Central and South America. Japan also has lately not only asserted a special position of authority in the Far East, but has concurrently been drawing nearer to association with the other Powers in international action.

Regarding the world then as a rudimentary social organism we perceive that the process of differentiation of function has already resulted in the development of a potential organ of control.

The governments of the eight Powers are in possession of full and direct sovereignty over the populations comprised within their own territories. There is also inherent in them a potential quasi-sovereignty of the entire world. The actuality of this quasi-sovereignty is conditional only upon their collective willingness to exercise it. It is therefore in the development of a common will on the part of the Powers of the world for the time being that the hope of the immediate future lies. The other conditions of the establishment of order are available.

On the other hand, the character and attributes of the smaller states afford no stable foundation for a superstructure of social order ; nor is there any reasonable prospect that they will take any decisive part in evolving an efficient organ of world-regulation and control. It is competent to them to assist the Powers in taking a right course, or, if the Powers are divided, to throw their own weight and influence upon the right side. But their direct power and responsibility in reference to the maintenance of general peace is so much less collectively and severally than that of the eight great states, that it is in effect different in character and nature.

In this connexion certain moral considerations are deserving of attention.

Where a duly constituted sovereign authority exists (as in the case of every civilized state) it is, generally speaking, the duty of all the citizens subject thereto, both individually and in association, to refrain from any acts which would constitute an encroachment upon the monopoly of power residing in the government. None but those who act as ministers of the sovereign authority ought to arrogate to themselves the exercise of any powers which properly pertain to sovereignty. This is so, not only because the sovereign authority is normally adequate for the preservation of order, but because the forcible intervention of unofficial individuals, though it might prove useful in particular instances, would in the long run tend to undermine the lawfully constituted authority and so to disturb the peace rather than to conserve it.

Where, on the other hand, although a society

exists, no sovereign authority has been developed, the case is essentially different. There, if disturbance of order is to be checked, or violent injury punished, individual members must assume the responsibility of taking the initiative. Intervention for the common welfare, though not authorized by any previous constitutional or conventional selection, so far from being treasonable or anarchical, is the only means of saving the society from confusion. Under such circumstances they who have the power to constrain their fellows—whether it be due to physical prowess, intellectual ability, or energy of character—are morally bound to exercise it for the common weal. They become responsible for taking the initiative. The possession of power to check violence and avoid chaos involves the moral obligation to exercise it effectively. In the case supposed, the society as such has no organized collective force : its power is distributed among its members. If therefore the exertion of force becomes necessary, it is from the members as such that it must proceed.

Now the society of states bears an obvious analogy to a society of individuals in which no sovereign authority has been set up. Accordingly, the fact that the Powers can preserve the peace of the world if they choose to do so, casts upon them the moral responsibility to the world as a whole for taking the measures necessary to attain this object. Their ability in this behalf is virtually recognized by the very term, "the Powers," which has long been in general use. Their prerogative and duty to exercise this ability has been, as we have seen, tacitly admitted for centuries. In this behalf reason

reinforces the propriety of the attitude which has been established by persistent practice.

It is, moreover, to be constantly borne in mind that a state is essentially an artificial entity, and is in itself of no real importance except in so far as it subserves the welfare and progress of the people who constitute its citizens. Individual beings alone are the ultimate object of all rational solicitude. Accordingly, so far as the Powers, by virtue of their ability to preserve the peace of the world outside their own borders, are charged with the moral duty of doing so, the duty is in the last resort to the peoples of the small states rather than to those states themselves.

At present we are considering how peace can be preserved forcibly. We must therefore think for the time being in terms of power, and be careful not to lose sight of the realities which dominate the situation.

If the Great Powers will refrain from fighting among themselves and act collectively to prevent strife outside their own borders the peace of the world can be secured.

The practical problem is therefore narrowed to this—how can we prevent each and every of eight states from fighting any or all of the rest ; and at the same time secure their collective action in preventing strife between any other of the states of the world ?

The twofold aspect of this problem in itself suggests the key to its solution. The negative object of any association will be furthered in proportion to the degree in which it is naturally incidental to the measures taken for the attainment of a



positive object. Agreeably to this general principle, the object of preventing the Powers from making war upon one another will be attained in proportion to the degree to which they can be induced to act together in taking the measures necessary for the welfare of the world as a whole. A League of Peace, if it is to be successful, must have a positive as well as a negative aspect. It must charge the Powers collectively with the active duty of taking the appropriate steps for the preservation of World-Peace.

We have seen that one of the main requirements of the world is an administrative authority—that without such a body indeed peace can never be secured upon a firm and lasting foundation. If the Powers will collectively accept the responsibilities of such an authority—if they will charge themselves with the full performance of their moral duties as trustees for the entire world—they will at the same time provide the fullest opportunities for the adjustment of their own differences; they will keep alive the bond of union between themselves; they will develop a sense of social solidarity; and their mutual covenants to refrain from fighting one another should be supported by a genuine disposition for peace.

It is, of course, desirable from every point of view that the smaller states should be directly parties to the proposed League, and that they should be fairly represented on any central council which may be formed in pursuance of its provisions. But, as a matter of practical politics, it is not essential that the adhesion of these states should be obtained, especially at the outset. *If collective action on the part of the Powers can be secured the*

*problem of the preservation of peace will for the time being have been solved practically.* All other difficulties admit of comparatively easy adjustment.

It may well be that, in the immediate future, although a majority of the Powers will be willing to become parties to a League of Peace, it may not be practicable to comprehend them all. Nevertheless it will probably be the wisest course in what follows to contemplate primarily, as the basis of the discussion, a universal scheme comprising all the states of the world.

## SECTION IV

### THE ESSENTIAL CONDITIONS

The object of immediate practical importance is to ascertain the essential conditions with which the constitution of a League of Peace must comply in order that its adherents may be in a position to achieve the greatest possible measure of success. It is these leading conceptions only which are the subject of real difficulty in this connexion. It is therefore desirable that they should not be obscured by the premature consideration of the numerous details and formal consequences which the actual creation of such a League would necessarily involve.

These essential conditions must depend upon the facts of state existence and international society which we have attempted to review in the preceding portion of this treatise. Those facts must accordingly be borne in mind in the consideration of the validity of the conditions now proposed.

It should be premised that in this section the

words " Power " and " State " are invariably used with their proper meanings respectively. By a " Power " is intended one of the eight Great Powers ; and by a " State " any separate political community whether a Power or not.

I. THE TREATY OF LEAGUE MUST PROVIDE FOR  
THE CONSTITUTION OF A COUNCIL AUTHOR-  
IZED TO DECLARE THE COLLECTIVE WILL  
OF THE CONSTITUENT STATES

The success of the League will depend upon the extent to which the allied states act together with a common purpose on appropriate occasions. Accordingly a council of representatives of these states by whom collective decisions may be reached and authoritatively promulgated will be necessary.

With a view to securing due deliberation in counsel and efficiency in action, provision must be made for the speedy convocation of this body whenever its services may be required.

II. IN THE COUNCIL OF THE LEAGUE VOTING  
POWER MUST SUBSTANTIALLY CORRESPOND  
WITH THE REAL POWER OF THE STATES  
REPRESENTED THEREIN

The existence of the League would be due to a general recognition of the fact that the preservation of peace—a pre-eminently moral object—can be secured only by the instrumentality of regulated force. The immediate purpose of the League would be the provision of such a force. The regulatory authority of the League and the obligatory effect of the decrees of the Council would largely

depend upon the power by which they were generally believed to be supported. If the League attempted to exercise authority without the support of adequate power there could not be a condition of stable equilibrium in the society of states.

If the constitution of the League rendered it possible for the Great Powers to be outvoted by the smaller states—if action might be decreed against their will, or vetoed in spite of their belief that it was essential—there would from the outset be a continual danger of a want of coincidence between the influence attaching to the real strength of the Powers and the conventional authority of the League, which would strain the alliance to the breaking-point.

In this matter there is no conflict whatever between expediency and justice. We have seen above that the theory of the equality of all states has no foundation either in fact or in moral principles. And any attempt to insist upon the realization of this conception in practice, while it would tend to retard the general advance of civilization, would particularly jeopardize the little states themselves. Only in peace maintained by the Powers can there be any security for their separate existence, and only by the disregard of the dogma of equality can peace be so maintained.<sup>1</sup>

<sup>1</sup> The records of the proceedings at several conferences held prior to the Great War show the necessity for emphasizing this point. In 1907, for example, a project for the creation of a Judicial Arbitration Court supported by Great Britain, Germany, France, Russia, and the United States of America, was wrecked by the insistence on the part of the South American Republics upon the application of the doctrine of equality to their representation on the proposed tribunal.



III. EACH OF THE ALLIED STATES MUST AGREE THAT IT WILL NOT, WITHOUT THE AUTHORITY OF THE COUNCIL OF THE LEAGUE, ENGAGE IN HOSTILITIES AGAINST ANY OTHER STATE EXCEPT FOR THE PURPOSE OF PRESERVING THE *STATUS QUO*.

This agreement would involve a very important limitation of the freedom of action hitherto maintained by states, and might tend to arrest the process of absorption of smaller communities by the great empires and republics whereby to a very large extent they have been built up. But such a restriction on all states alike is a necessary condition of the assurance of world-peace.

At the same time, there need be nothing in the provisions of the treaty of League to prevent any state from incorporating new territory ceded to it by another state with the consent of the people immediately concerned therein.

IV. EACH STATE MUST JOINTLY AND SEVERALLY COVENANT WITH THE OTHER MEMBERS OF THE LEAGUE THAT IT WILL TAKE ALL MEASURES (SUBJECT TO ANY EXPRESS QUALIFICATIONS) WHICH SHALL BE PRACTICABLE AND NECESSARY ON ITS PART IN ORDER TO GIVE EFFECT TO THE DECISIONS OF THE COUNCIL OF THE LEAGUE DULY FORMED AND PROMULGATED IN CONFORMITY WITH THE PROVISIONS OF THE CONSTITUTIVE TREATY

It would probably be wise to provide that, so long as war should not have broken out, in

order that the Council might give an obligatory direction with a view to the maintenance of peace, a large majority, say of five-sixths, should be necessary. But, in the event of the outbreak of war, each Power would, *ipso facto*, be bound to active co-operation with the others in extinguishing it.

Whether the very small states should undertake to co-operate actively in military measures decreed by the Council to be necessary may be doubted. All states should, however, be under an obligation to facilitate the operations undertaken in pursuance of the general will and for the common benefit. Accordingly it should be provided that, when the Powers are engaged upon military operations for the purpose of restoring peace, they should be free to carry out any measures deemed to be necessary within the territories of the other states. Only so could the Powers command the proper facilities for putting the maximum stress upon a recalcitrant state or states, whether by investment, blockade, or otherwise. It might even be desirable to extend this freedom of operation to cases where, without actually making war, the League should adopt measures of constraint against a particular state.

The vast benefits which the League would secure for small states would not be purchased too dearly by this obligation on their part to passive assistance in the operations necessary for the fulfilment of the functions of the organization. It is, moreover, evidently in accordance with justice that, where the Powers would be striving for the general security, their operations should not be hampered by any

single state. From a practical standpoint, moreover, it is clear that the freedom of the League to operate anywhere and everywhere would tend greatly to accelerate the success of their arms and to keep the sufferings and inconveniences incident to hostilities within the narrowest limits possible.

The reciprocal undertakings between the states which were parties to the League to concur in measures the object of which was the preservation of peace would of course completely differentiate the League from an ordinary alliance the proximate object of which is only the interest of the contracting parties themselves.

The constitution of the League would cast upon each of the Powers and other states with considerable populations the obligation of providing its fair proportion of the armed forces agreed to be necessary from time to time in order to support the authority of the alliance in cases where its active intervention should be required. Every such state would accordingly maintain the forces indicated for this purpose. It would also maintain any forces that might be necessary for any special and legitimate purpose of its own; as, for example, the preservation of order in outlying territories bordering upon regions inhabited by races still uncivilized, or the protection of particular routes.

The maintenance, however, by any state of forces largely in excess of those which could be employed for the foregoing purposes would be inconsistent with the scope and objects of the League. It would, moreover, naturally give rise to apprehension that such forces might be used in contravention of the provisions of the treaty, and would therefore con-

stitute a standing menace to the system established thereby.

In addition to this, it is to be borne in mind that the permanent success of the League would largely depend upon that general disposition towards peace which will be favoured by the prevalence of civil liberty throughout the several states of the world; and so long as any state maintains a vast army of conscripted citizens there cannot be a full and free development of such liberty therein.

Accordingly, in order that the League might have a fair prospect of success, disarmament on a vast scale would be necessary. The settlement of the principles and details of the scheme on which it should proceed would constitute a principal part of the work of the statesmen who negotiated the provisions of the Treaty.

V. THE COUNCIL OF THE LEAGUE MUST TAKE  
COGNIZANCE OF ANY INTERSTATAL RELATIONS  
BY WHICH THE PEACE MAY BE THREATENED  
IN ANY PART OF THE WORLD, AND (SUBJECT  
TO THE QUALIFICATIONS STATED IN THE NEXT  
CONDITION (VI)) MUST UNDERTAKE THE  
FUNCTION IN THE LAST RESORT OF SETTLING  
DISPUTED CLAIMS

Covenants in restraint of war will be permanently effective only when all that could be usefully and properly attained by war can be secured by other means. It will not be enough for the League to declare that war shall not be permitted. If it is to attain this negative object it must itself have a positive function. While it prevents any state or



nation from asserting a claim by war, it must (subject to the qualifications indicated) see that the state against which a claim may be made does not withhold what justice and expediency require that it should concede.

We have observed that the machinery for the settlement of disputes by mediation or arbitration already exists, and that it is in course of improvement and development. Wherever controversies are settled by these means or the like of course no necessity will arise for the intervention of the League. Where it is otherwise the Council of the League must act. Every claim of one state against another must be settled without war. Failing, therefore, its settlement by some means agreed upon by the parties, upon the application of either, the Council itself must provide for its determination and insist that justice is done accordingly. If the claim is of a legal character, it will procure a decision thereon by a tribunal acting as a Court of Justice. If the claim is of a nature outside the scope of jurisprudence, the Council may in the first place attempt its adjustment by some method of mediation or reconciliation. But wherever, whether sooner or later, the Council is confronted with the necessity of pronouncing a decision itself, it will do so as a matter of administrative action.

It was pointed out in Chapter II that the continual changes in the relative strength and territorial needs of states due to the increase or decline in numbers and virility of the various nations, as well as certain other causes, have hitherto given rise to a kind of natural necessity from time to time for the alteration of frontiers which has generally been

accomplished only at the cost of war. The same kind of necessity, although it may be in a diminishing degree, will arise in the future. Accordingly, among the most important claims which the Council will have to adjust will be those for changes of frontier and accession of territory. Such a jurisdiction will be amply justified by its necessity in order that the supreme object of the prevention of war may be attained. But it is evident also that small states will directly benefit by a system which secures to them the collective consideration of the great Council of the League, acting in the general interest, in lieu of their present precarious integrity, accompanied as it is by the risk of arbitrary and cruel action on the part of individual Powers.

It must never be forgotten that the necessity for the existence of such a League as we are considering arises from the admitted and obvious insufficiency of purely moral influences for the maintenance of peace ; and that the existence of the League as a restraining power involves *pro tanto* the limitation of the independence of all states respectively. "Idcirco omnes servire sumus ut liberi esse possumus."

The League can fulfil its supreme function of maintaining order only by intervention in the affairs of disputant states. In order that its intervention may be supported, not only by the physical power at its command, but by the moral approval of mankind—in other words, in order that its intervention may be reasonable and in the general interest—it must of necessity assume jurisdiction over all matters which involve the risk of international disorder.

Such a jurisdiction would indeed be by no means

novel in its character. It was, as we have seen, partially and intermittently exercised by the Concert of Europe in the last century, and by many of the earlier Congresses of the Powers. Moreover, the various treaties whereby the territories of particular states have been guaranteed or neutralized are in themselves a restriction upon the action of other states and in effect an assertion of the principle of the interdependence of states and their common interest in one another's concerns.

#### VI. THE SEPARATE SOVEREIGNTY OF EACH OF THE ALLIED POWERS MUST REMAIN SUBSTANTIALLY UNIMPAIRED BY THE CONSTITUTION AND OPERATIONS OF THE LEAGUE

In order that this negative condition may be satisfied the treaty of League will not provide, either expressly or impliedly, for the exercise of force against any Power except where it has itself commenced hostilities. From this it will follow that no part of the territory recognized in the treaty as belonging to any Power can be taken from that Power without its consent.

The general authority of the Council of the League will thus be subject to important limitations.

The necessity for this condition will, however, be apparent from the considerations set forth in Chapters III and IV.<sup>1</sup> The Powers are not, indeed, prepared to surrender their respective sovereign

<sup>1</sup> Cf. Bluntschli in *Europa als Staatenbund*, where he says that "the fundamental condition of the solution of the problem of European organization is the preservation of the independence and freedom of the confederated states."

rights. Nor is it expedient in the present state of the world that they should make so vast and momentous a sacrifice. The interests which are centred in these great states, severally and collectively, are too important to be jeopardized by a fundamental change in the basis of civilization and order, so long as it remains probable that such a change would not result in any durable improvement in the polity of the world as a whole.

Moreover, even if the Powers could be induced to concede to the League the right of coercing them severally by force of arms, in circumstances where coercion was not necessary for the purpose of restraining their own belligerency, it seems probable that the attempt on the part of the League to exercise this right would prove too great a strain upon the system established thereby.

Nevertheless it is practically certain that the existing boundaries of their territories will from time to time be altered: notwithstanding the fact that for such alterations the consent of the Powers concerned will be necessary.

It follows as a corollary from this condition that so far as the Powers are concerned the operations of the League must be carried on by means of their co-ordinated but independent action. The League must act by and through the Powers.

That such action may be effective has been repeatedly demonstrated by the achievements of the Concert of Europe. It has also been clearly shown by the course of the Great War in which the allied states on each of the opposing sides, while retaining their separate authority respectively, have, for the most part, acted with the unity of purpose and



method required by the circumstances of the contest.

## SECTION V

### THE LEAGUE IN ACTION

Many people will doubt whether, if a League of Peace could be formed, it would contribute materially to the prevention of war. The fact that, in the present conflict, while two of the Powers have been fighting on one side, the remaining six have ultimately been ranged upon the other, will in itself not unnaturally suggest many considerations which are calculated to lead to a sceptical attitude as to the efficacy of the proposed alliance.

Many, indeed, will think that, while the existence of such a league would induce some states to refrain from maintaining large defensive forces, it would encourage others to prepare secretly for their overthrow and accordingly that its results would be positively mischievous. The contemptuous disregard for the obligations of treaties which has been displayed by Germany obviously lends colour to this view.

Others, perhaps, will think that they discern in the conception of the League a threat against the liberties of the smaller states and the prospect of unnecessary meddling in their internal affairs. The case of the Holy Alliance may be cited as a precedent justifying apprehensions of this kind.

On the other hand it may reasonably be suggested that the existence of a league such as is here proposed would really involve consequences which together would go far towards the establishment of an en-

during peace without in any way endangering the general welfare of mankind. In any case it does not seem extravagant to suppose that so long as the League was a living reality the following results would for the most part ensue.

Every state would have a fair opportunity of obtaining the realization of its legitimate desires by an appeal to the collective judgment of the alliance. A complaint such as that which Austria made against Serbia in 1914 would clearly be an appropriate subject for the consideration of the Council of the League.

No state would feel constrained to take an individual and independent course such as that which Russia took in replying to the aggression of Austria.

The action of the League would generally be in accordance with justice. The interests of the Great Powers would be safeguarded by their own participation in the decisions of the Council. The rapid spread of democratic institutions; the steady elimination of the factor of personal autocracy from the conduct of foreign policies; and the persistent bias of Britain and the United States of America in favour of civil liberty, the claims of nationality, and the interests of small communities, would be a sufficient guarantee against anti-popular or oppressive action.

International public opinion would increase greatly in efficiency and strength; and an international social imperative forbidding aggressive war would tend to develop into an irresistible influence.

The longer peace remained unbroken, the higher would be the prestige of the League and the greater the reluctance to defy its will.

States which now maintain considerable armed forces in excess of the establishments necessary for the maintenance of internal order would steadily reduce them. States which do not now maintain such forces would not establish them.

If any state should attempt to make preparations for a conflict with other members of the alliance suspicion would be aroused and a crisis precipitated before such preparations had resulted in the establishment of preponderant power.

No state would commence war of any kind on its own responsibility alone unless and until it had deliberately determined to challenge the League to a trial of strength ; and no state would encounter the risk of the hostility of the League under any circumstances which appear likely to occur.

If war should break out, the aggressors would be confronted at once with the full strength and resources of the alliance, the forces of which would be free to act in any and every quarter in which it was deemed advantageous to carry on their operations. The blockades instituted by the League would be effective from the outset.

Consequences such as the above can, however, be anticipated only on the assumption that the League would prove an active and vigorous reality.

And it must be admitted that both the durability of the League and the extent to which it would prove effective for its purpose while its existence continued are open to reasonable doubt. One cannot overlook the possibilities of widespread dissatisfaction with its decisions and methods, of backwardness on the part of leading states in

supporting them, of dissension between the more powerful members of the League, and of the commencement of hostilities by a formidable group of states at a time when its vigour was impaired and its prestige low.<sup>1</sup>

We shall in the next chapter consider a further factor calculated to afford cohesion to the League and to render it practically efficient for the attainment of the object in view.

PROPOSITION XV.—In order that the duty of all states to each and of each to all may be fulfilled, the states should by a treaty of alliance constitute a representative body charged with the function of determining the administrative and executive measures which may from time to time be necessary for the preservation of peace, and agree together that they will respectively co-operate with one another in carrying such measures into effect.

<sup>1</sup> In any case, however, it would seem that the earnest discussion of the subject which will take place in the immediate future will serve to promote the formation of a body of intelligent international opinion from which in itself the most beneficent results will ensue.



## CHAPTER XVI

### CUSTODES PACIS

**N**OTWITHSTANDING all the moral and political forces which will henceforth work together for the preservation of peace, it is probable that critical occasions will arise when right will be threatened by great material power controlled by unscrupulous ambition, and when the general order and welfare will be maintained, if at all, only by the exercise of a might wielded for the common good.

The formation of a League of Peace is apparently, as we have seen, a practical measure which mankind might well adopt for the provision of the resources necessary for the security of civilization in its hours of need. But something not to be found in the formal articles of its constitution would still be necessary in order that peace might be in any sense effectively assured. The leadership *de facto* of a great state or group of states qualified and willing at all times to take the initiative in the active measures requisite for the prevention of war would have to be available. Otherwise, at the times of greatest stress and strain the authority of the League might be nullified by vacillation or dissension in its council, or its strength rendered

unavailing through a failure on the part of a majority of the Powers to take the prompt and vigorous action appropriate to the occasion.

It is a reasonable inference from the course of the development of popular organizations in our own time, as well as from the results of the study of primitive communities, that, wherever social order has to be established among human beings who recognize no common authority by which their conduct is controlled, one or more members of the social aggregate must from time to time take the initiative in regard to such measures as may be necessary for the purpose. Only by such individual action can the good sense and right feeling of the community be evoked so as to result in the concentration of its inherent strength in a preponderating power adequate to the exigencies of the occasion.

“Setting out,” says Herbert Spencer, “with an unorganized horde, including both sexes and all ages, let us ask what must happen when some public question, as that of migration, or of defence against enemies, has to be decided. The assembled individuals will fall, more or less clearly, into two divisions. The elder, the stronger, and those whose sagacity and courage have been proved by experience, will form the smaller part, who carry on the discussion; while the larger part, formed of the young, the weak, and the undistinguished, will be listeners, who usually do no more than express from time to time assent or dissent. . . . In the cluster of leading men there is sure to be one whose weight is greater than that of any other—some aged hunter, some distinguished warrior, some

cunning medicine-man, who will have more than his individual share in forming the resolution finally acted upon. That is to say, the entire assemblage will resolve itself into three parts. To use a biological metaphor, there will, out of the general mass, be differentiated a nucleus and a nucleolus. . . . This form of ruling agency is thus shown to be the fundamental form by its presence at the outset of social life and by its continuance under various conditions. . . . In fact, as already implied, governmental organization could not possibly begin in any other way. On the one hand, no controlling force at first exists save that of the aggregate will as manifested in the assembled horde. On the other hand, leading parts in determining this aggregate will are inevitably taken by the few whose superiority is recognized. And of these predominant few, some one is sure to be most predominant. . . . We have to note, particularly, the truth that at the outset may be discerned the vague outlines of a triune political structure.”<sup>1</sup>

In this respect that which is true of a primitive community of individuals is likely to prove equally true of the great community of states in the rudimentary condition of organization in which it still remains. Applying the biological analogy, it may be said that the League of Peace would assist the process of the differentiation of the nucleus of the system of order, but the function of the nucleolus would also be essential to the development of the mass into an active and efficient organism.

Accordingly, even if such a League be formed, and *a fortiori* if it be not, in order that the world

<sup>1</sup> *Principles of Sociology*, vol. ii. pp. 311-6.

may be rendered secure from the horrors and devastations of war, it will be necessary that there should be a Power, or a partnership of Powers so closely akin in character and purpose as to feel and act as one, ever mindful of Public Right and earnestly inclined to peace, upon which reliance may always be placed by others; which will consistently take the lead as occasion may require in rallying the forces of order; and whose own might and influence will be sufficiently great to render it probable that the side upon which they are exerted will ultimately prevail. If such a Power, or Partnership of Powers, exists, it is not unreasonable to hope that justice may be upheld throughout the earth without the necessity for actual armed conflict, save in rare instances and to a comparatively limited extent.

For if it were generally believed throughout the world that in any and every proper case the most powerful union in the society of states would certainly assume the initiative and to the utmost of its influence and authority insist upon others doing likewise, there would be a strong probability that, generally speaking at all events, the forces of order would be effective for the attainment of their object. A state or states inclined to wrongful and violent conduct would know in advance, not only that an attempt to enforce the realization of their desires would meet with the opposition of those whose interests were directly threatened, but that the might of the greatest union was already to all intents and purposes arrayed against them, and that almost certainly a considerable proportion of the other states would rally to the forces of order.



There would normally be a strong inducement to all states to fulfil their duty; for the states which declared for the cause of right and order would as it were be ranging themselves on the safer side. Thus the probability that aggression would be attended by evil consequences would be established and a real sanction for Public Right would subsist.

It is already apparent that the two states whose might is greater than that of any others are also pre-eminent in their love of right and their desire for general peace. The British and American commonwealths together have at once the physical strength and the spiritual qualifications for the essential function of leadership in the tremendous task of the preservation of world peace. The energy of their peoples, their material resources, the traditional policy of their governments and the influence to which it has given rise, alike mark them out for this splendid service to humanity.

Should it then appear that these great communities are willing to collaborate in this direction—that in fact the English-speaking races as a whole, and those who are associated with them in political allegiance, are henceforth firmly united in the common purpose of establishing and maintaining the peace of the world—the essential conditions of order in the society of states will be forthcoming.

*England's Respect for Right.*—The history of England and the British Empire is closely associated with the development of the conception of Right. It may indeed be truly said at the present time that the august fabric of the commonwealth is based upon the national respect for Right. The flag of Britain is everywhere the symbol of a power

which guarantees human freedom, civil liberty, and the covenants of plighted troth.

As early as the thirteenth century the reign of law had become established in England in a far wider sense than was the case elsewhere. Law was not only the source of the rights of one citizen against another, but the beneficent preventative of despotism. The Courts of Justice, while maintaining the King's Peace between his subjects, at the same time protected them against the abuse of the executive powers of government. By the constant practice of referring disputes of every kind to the standard of positive law, Englishmen became accustomed to regard Right and its correlative Duty as realities of transcendental authority. The system of law and its administration educated them in the habitual regard for Right.

Magna Charta, moreover, was not only the "Keystone of English liberty," as Hallam called it, but a landmark for the guidance of all in other lands who desired to escape from the government of irresponsible absolutism.

Speaking of this memorable instrument, Sir James Mackintosh says: "To have produced it, to have preserved it, to have matured it, constitute the immortal claim of England upon the esteem of mankind. Her Bacons and Shakespeares, her Miltons and Newtons, with all the truth which they have revealed, and all the generous virtue which they have inspired, are of inferior value when compared with the subjection of men and their rulers to the principles of justice; if indeed it be not more true that these mighty spirits could not have been formed except under equal laws, nor roused to full activity

without the influence of that spirit which the Great Charter breathed over their forefathers." <sup>1</sup>

It would, however, be quite possible to read through Magna Charta, the Petition of Right, and the Bill of Rights, which Lord Chatham designated "the Bible of the English Constitution," without perceiving that the really distinctive feature of that Constitution is this: "In England not only is no man 'above the law,' but every man is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. Upon this principle depends (1) the responsibility of all officials from the highest to the lowest, and (2) the right of the subject, however humble or obscure, to seek redress for any injury or wrong inflicted by them, and (3) to seek it in the ordinary tribunals." <sup>2</sup>

It is accordingly the fact that the reign of positive law, in its aspect of the standard of civil rights enforced in the ordinary Courts of Justice, has been more absolute in England and the countries whose institutions are derived from ours, than elsewhere. Englishmen and their kindred have thus become peculiarly accustomed to regard the conception of right, whether as the creation of custom, convention, or the direct enactment of the legislature, as prevalent throughout human affairs.

Side by side with the development of the reign of law, and closely associated therewith, there occurred the gradual establishment of representative government—government by an executive dependent upon an assembly elected by the people

<sup>1</sup> *History of England*, i. 222.

<sup>2</sup> Marriott (*English Political Institutions*, p. 40), referring to Dicey's *Law of the Constitution*, where this point is fully developed.

—by which the conception of right has become closely associated with the conceptions of civil liberty and individual freedom.

The Parliament summoned by Edward I in 1295, "both as to causes of summons, and as to constitution, may be justly regarded as the ideal of a representative assembly for the age in which it existed. It was, in fact, to the kingdom what the full County Court was to the shire, an assemblage in which every class and every interest had a place. And so it was intended to be by the great King who had the skill and courage to adapt the organization of the County Court to the requirements of the Kingdom. 'As it was a just rule,' he says; 'that what concerns all should by all be approved, so it is very plain that we should meet common dangers by remedies in common.'"<sup>1</sup> In the result this Parliament "was the noblest monument ever reared by mortal man. . . . He left it a body representing the nation from which it sprung, and claiming to take part in the settlement of all questions in which the nation was concerned. Many things have changed, but in all main points the Parliament of England, as it exists at this day, is the same as that which gathered round the great Plantagenet. It is especially the same in that which forms its chief glory, that it is the representative not of one class, or of one portion of society alone, but of every class and of every portion which, at any given time, is capable of representation."<sup>2</sup>

"It is a fact that the constitution and procedure of the legislature in every other country, with the

<sup>1</sup> Anson's *Law of the Constitution*, pt. i. (3rd ed.) pp. 46-7.

<sup>2</sup> Gardiner, *History of England*, i. p. 21.



possible exception of Hungary, are copied, directly or indirectly from, or, at least, based on ideas suggested by, the English model. . . . To the model parliament held by the first Plantagenet Edward may be traced back all the parliaments and legislatures which "are now making laws in every part of the civilized world."<sup>1</sup>

English constitutional history is indeed an important part of the common interests and possessions of mankind. It "is pre-eminently suited to give a picture of the inner coherence of the various members of the state and society, on which the history of all constitutions and the fate of all nations is really based. In these reciprocal relations the history of former centuries returns to life, and becomes a mirror wherein are reflected the struggles of the present; but above all it must be regarded as manifesting the overruling Providence which guides the destinies of mankind according to right and towards the right."<sup>2</sup>

*A Consensual Empire.*—The relations between Great Britain and its dominions and dependencies are substantially based upon a common consent to political union. There is nothing in these relations which is antagonistic to right. Throughout the British Commonwealth of Nations order rests upon civil liberty.

The policy of Britain towards the overseas dominions has long been guided by a primary regard for their own welfare. The United Kingdom has behaved towards them not only with good

<sup>1</sup> Ilbert's *Parliament*, pp. 220, 245.

<sup>2</sup> Gneist's *History of the English Constitution*, Preface (Ashworth's translation, 1891), p. ix.

faith, but with generosity. Until comparatively recent times, indeed, the unselfish attitude of the mother country almost assumed the aspect of indifference to the importance of maintaining a political tie between itself and these kindred peoples. Happily, however, while this attitude rendered it easy for the central government to abstain from irritating interference with their local interests, it did not result in the alienation of their sympathy or the withdrawal of their allegiance.

For more than a generation these great Dominions have been free to choose their own political status. They could have become separate sovereign states if they had so desired. Their choice is no longer doubtful. It has been made by the covenant of supreme sacrifice and unbounded devotion. They have chosen union and not independence. They have elected to seek their destiny in the larger life of a great community of nations. They have shown by their passionate loyalty to the flag of Britain that it is a symbol of an inheritance in which they share, and that the glories of England belong as truly to the inhabitants of the most remote parts of the Empire as they do to the citizens of London.

It is now accordingly manifest, for the first time in the history of the world, that great communities in different quarters of the globe may be firmly united in a common political allegiance by virtue of their own deliberate election. We see a sovereignty existing over areas which are separated as widely as possible over the surface of the earth, resting on the common consent and mutual goodwill of their inhabitants—a sovereignty which casts

no shadow—a sovereignty potent to maintain order and to concentrate beneficent power, but to which no sense of subjection is correlative. In this complete reconciliation of local autonomy with allegiance to a world-wide commonwealth we may perhaps indeed find a pregnant suggestion of the ultimate destiny of mankind at large.

Britons have, however, by no means confined the practical consequences of their respect for right to their relations with their own kindred. Wherever they have assumed the government of an alien people they have founded Courts of Justice and thrown wide their doors for the entrance of the humblest native who might desire to demand the protection of the law. Wherever they have found a slave they have set him free. They have even maintained costly squadrons on the routes of ocean in order to hunt down and suppress the traffic in human flesh.

It is, moreover, upon this essential fact of England's respect for freedom and for right that the security of the connexion between the United Kingdom and India and the other dependencies mainly rests to-day.

Indians know that Britons have governed them with an honest and persistent endeavour to respect their rights and to further the good of their country. And so, amid the crash and din of warring continents, the princes and peoples of India have stood firm in their allegiance. More than this, by their active exertions in the common cause, they have made good their title to a spiritual brotherhood with Britons, which must have a far-reaching effect in diminishing the prejudices due to differences of colour and of race and in strengthening the founda-

tions of political union between the divers peoples of the Empire.

And the same broad truth is apparent when we look to those backward communities living in remote corners of the earth who own allegiance to the great White King. It might be difficult to discover on the part of the chieftains and notable men of these dusky tribes a clear perception of the causes and merits of the war. Yet how many of them have sincerely and earnestly importuned the Unseen, according to the faith of their fathers, that the flag of England might not droop nor the greatness of her people fail !

It appears then that the characteristic features of the national life of Englishmen—their legal and judicial system, their representative institutions, their local and imperial politics—have concurred in developing in the individual citizens the conceptions of right and the sanctity of human freedom, and in fostering the practical recognition on their part of the correlative duties which these conceptions involve. In the result, we find the British Empire itself—founded, as in the main it is, upon the consent of the peoples comprised within it and regulated as its actions must for the most part be by the predominant sentiments of its citizens—the chief witness throughout the world to the supreme majesty of right and the foremost champion of those who are unjustly assailed by the superior might of others.

*Britain's Wars for Right.*—Britain has in practice carried the respect for Right into the arena of her relations with foreign powers. Her policy and strength have long been the principal obstacles in



the way of the warlike ambitions of great military empires and the main factors in the maintenance of peace. The chief disturbers of interstatal order in modern times, such as Philip II of Spain, Louis XIV of France, Napoleon, and Kaiser Wilhelm II, have found in England the head of unconquerable coalitions. It has, indeed, in a sense been the special and characteristic rôle of Britain to foster the general recognition of Right by other states. The insular position of the mother country has in modern times excluded any desire of expansion on the European continent; while her widely scattered dominions and vast trading operations throughout the world have rendered peace her greatest interest.

“The accession of George the First,” said J. R. Green,<sup>1</sup> “marked a change in the position of England as a member of the European Commonwealth. . . . To prevent the undoing of all that the Revolution had done England was forced to join the Great Alliance of the European peoples, and reluctantly as she was drawn into it she at once found herself its head. . . . The Peace of Utrecht left England the main barrier against the ambition of the House of Bourbon. Nor was this a position from which any change of domestic policy could withdraw her. . . . As the one check on France lay in the maintenance of a European concert, in her efforts to maintain this concert England was drawn out of the narrower circle of her own home interests to watch every movement of the nations from the Baltic to the Mediterranean. And not only did the Revolution set England irrevocably among the

<sup>1</sup> *History of the English People*, vol. iv. pp. 105-8.

powers of Europe, but it assigned her a special place among them. The result of the alliance and the war had been to establish what was then called a 'balance of power' between the great European states; a balance which rested indeed not so much on any natural equilibrium of forces as on a compromise wrung from warring nations by the exhaustion of a great struggle; but which, once recognized and established, could be adapted and readjusted, it was hoped, to the varying political conditions of the time. Of this balance of power, as recognized and defined in the Treaty of Utrecht and its successors, England became the special guardian. Her insular position made her almost the one great state which could have no dreams of continental aggrandizement. . . . Her only interest lay in the maintenance of European peace on the basis of an observance of European treaties. . . . That the twenty-five years which followed "the Peace of Utrecht" were for Europe as a whole a time of peace was due in great measure to the zeal with which England watched over the settlement that had been brought about at Utrecht. To a great extent her efforts averted war altogether; and when war could not be averted she brought it within as narrow limits and to as speedy an end as was possible. Diplomacy spent its ingenuity in countless choppings and changings of the smaller territories about the Mediterranean and elsewhere; but till the rise of Prussia under Frederick the Great it secured Europe as a whole from any world-wide struggle.<sup>1</sup> Nor was this maintenance of

<sup>1</sup> "The great resource of Europe," said Burke, "was in England . . . in that sort of England who considered herself as

European peace all the gain which the attitude of England brought with it. . . . In struggling for peace and for the sanctity of treaties, even though the struggle was one of selfish interest, England took a ply which she has never wholly lost. Warlike and imperious as is her national temper, she has never been able to free herself from a sense that her business in the world is to seek peace alike for herself and for the nations about her, and that the best security for peace lies in her recognition, amidst whatever difficulties and seductions, of the force of international engagements and the sanctity of treaties. The sentiment has no doubt been deepened by other convictions, by convictions of at once a higher and a lower stamp, by a growing sense of the value of peace to an industrial nation, as by a growing sense of the moral evil and destructiveness of war. But strong as is the influence of both these sentiments on the peace-loving temper of the English people, that temper itself sprang from another source. It sprang from the sense of responsibility for the peace of the world, as a necessary condition of tranquillity and freedom at home, which grew into life with the earlier years of the eighteenth century."

In the nineteenth century the power and influence of Britain were no less consistently exercised in favour of international order and the maintenance of peace than had been the case during the preceding century.<sup>1</sup> From the wars against Bonaparte to embodied with Europe ; . . . in that sort of England who, sympathetic with the adversity or the happiness of mankind, felt that nothing in human affairs was foreign to her" (*Overtures of Peace*, Letter I.).

<sup>1</sup> Speaking of British sea-power, Dr. Roland G. Usher, of Washington University, says in *Pan-Americanism*: "The

the war with the Central Empires, Britain stood for resistance to the breaking up of treaties and the domination of Europe by military power.

Whether therefore we look to the past or to the present, we see in Britain the champion of Public Right and the Prime Custodian of the Peace.

Will Britain continue to sustain the weight of this glory in the future? That she will have the disposition to do so we may feel assured. The question of practical importance is this—will the power of Britain be adequate for the fulfilment of the momentous duties which the exigencies of world politics and her own character and position appear to indicate as her special trust?

*The Power of Britain.*—The strength of the Empire relatively to that of other states is already great; and potentially it is greater still. Its citizens constitute a quarter of the entire population of the world. Its geographical distribution is in the highest degree favourable. Most of the keys of the earth are in its possession. Its wealth and resources, and the possibilities of their development, are so vast that they cannot be estimated adequately.

moderation and wisdom with which England has used her authority is more responsible than the strength of her fleets for the length of time that she has been supreme, and for the relatively few times in the past when her control has been really threatened or indeed advisedly questioned. . . . So long as England controls the sea we need only remember the generosity and forbearance of her conduct in the past to assure ourselves of its continuance in the future. . . . Not only her position but her experience in the past fits England to rule; she has learned her lesson and has demonstrated her ability to rule with efficiency and due regard for justice."



The strength of the Empire is buttressed by its prestige. This is to a large extent based upon the secular invincibility of the British race ; but still more upon the freedom of every kind which prevails throughout its borders, and the many services for which other states and nations are indebted to its influence and power.

“ It is on the British race . . . that rest the highest hopes of those who try to penetrate the dark future, or who seek to raise and better the patient masses of mankind. Each year the power and the prerogative of that race appear . . . to increase ; each year it seems to fill more and more of the world.”<sup>1</sup>

But the utmost power which the British Commonwealth can command will be necessary for the adequate performance of its true function.

It is certain that, in order that it may be “ henceforth a supreme factor in the balance of the world,”<sup>2</sup> it must remain a united commonwealth. If it were to be disintegrated and the United Kingdom were left alone and relatively weak, it is difficult to find reasonable grounds for anticipating assured and lasting peace either in our own time or in that of many generations yet to come.

Amid much, indeed, which is doubtful or obscure in connexion with the future of international relations one central truth stands out clearly as our guiding cloud by day and our pillar of fire by night : *Whatever tends to strengthen the British Commonwealth makes for the peace of the world.*

Well might Gladstone say : “ This Great

<sup>1</sup> Lord Rosebery, speaking in Adelaide on 18 Jan. 1884.

<sup>2</sup> Lord Rosebery, speaking at Chatham on 23 Jan. 1900.

Empire . . . has committed to it a trust and a function given from Providence as special and as remarkable as ever were entrusted to any portion of the family of man. . . . When I speak of that trust and that function I feel that words fail me : I cannot tell you what I think of the nobleness of the inheritance that has descended upon us, of the sacredness of the duty of maintaining it.”<sup>1</sup>

*Partnership with America.*—Regarded as a member of the Society of States, the American Commonwealth has a stainless record such as no other political community known to history has ever enjoyed. The United States of America have not only abstained from injuring other communities; they have habitually shown their love of liberty and order, and their sympathy with the better aspirations of mankind. In their relations with other governments and peoples their statesmen have revealed themselves as men who in their right hands “carry gentle peace to silence envious tongues”—as the representatives of a mighty people who are “just and fear not.” It needed only their participation in the Great War to demonstrate the positive character of their plenary interest in the welfare of the world at large—their willingness, upon the right occasion, to act as well as to forbear.

Spiritually the Briton and the American are twin brothers. In all essentially human characteristics—in respect of all things which tend to elevate the soul and to fit men to make the best of the world in which they live—the citizens of London and the citizens of Washington are one and the

<sup>1</sup> Speech in Edinburgh on 17 March 1880.

same people. Both alike "speak the tongue that Shakespeare spoke, the truth and morals hold that Milton held." Their laws are for the most part similar; their sense of justice is the same. The heroes and the traditions of British history from the time of Cerdic to that of Chatham belong equally to both. And during the century and a half in which they have lived and worked apart, their essential kinship has prevented the occurrence of any real differentiation between them. Americans "have kept what may be called the faith of the race. They have kept the racial and national characteristics." Their "standards of character and of honour and of duty are" our "standards, and life and freedom have the same meaning to" them "that they have to" us.<sup>1</sup> Naturally, therefore, now that external events have brought Britons and Americans together with a common purpose on the field of battle, they do not merely stand side by side as allies, but they are reunited as one people.

The necessity of fighting shoulder to shoulder for "the greatest victory for free government that was ever won . . . has revealed the future of the world to us, not as its conquerors but as its necessary preservers of peace. . . . No combination of peace-loving nations can be made effective without both branches of our race. This Empire and the Great Republic must then be the main guardians of civilization in the future—the conscious and leagued guardians of the world."<sup>2</sup>

<sup>1</sup> Dr. Walter H. Page, speaking at Plymouth on 4 August 1917: *Times*, 6 August 1917.

<sup>2</sup> *Ibid.*

PROPOSITION XVI.—In any circumstances which can now be contemplated, in order that peace may be maintained, it will be necessary that the British and American Commonwealths should together take the principal part in the measures required for the prevention of wars ; and the greater the power of these commonwealths and the closer their association may be, the greater will be the probability that such measures will be successful.



## CHAPTER XVII

### THE BRITISH UNION

THE time has arrived when the British Empire should be reorganized as a Commonwealth of Nations united by a constitutional system, through which the political energy of each of the communities comprised within it may flow freely to the common centre, and the vital strength developed there may be returned to all alike. Such a system is essential in order that this Commonwealth may be able to realize the full measure of its potential corporate efficiency and adequately fulfil its function in the guardianship of the world's peace.<sup>1</sup>

It will be convenient to summarize here the leading considerations which render this conclusion inevitable.

I. In order that the people who are now comprised within the British Empire may exercise their greatest possible influence upon the course of human affairs they must continue to be associated together in a common political allegiance.

Half a century ago the view was very widely

<sup>1</sup> As a matter of nomenclature it would seem desirable that the "British Empire" should become the "British Commonwealth."

held that the natural trend of events would lead to the severance of the connexion between the United Kingdom and the British communities beyond the seas, and that this severance would be for the advantage of all concerned. Eminent statesmen predicted that the Colonies, after becoming separate republics, would not only be more prosperous than ever themselves, but would be as useful to Great Britain in the character of friendly or allied states as they had been when constituent parts of the Empire. Many people, moreover, even so late as August 1914, thought that the tendency of modern ideas was leading to a general weakening of civic patriotism throughout the world in favour of a cosmopolitan sympathy.

Such views as these can hardly be entertained by thoughtful people now.

For some decades the political relations between the Dominions and the mother country have been increasing in intimacy and cordiality. The strength of mutual devotion has steadily become more apparent. And recently on the battle-fields of all the continents of the old world, in the persons of the sons of the Dominions, England has been "muing her mighty youth and kindling her undazzled eyes at the full midday beam" of a glory which can never pass away. Side by side with the warriors of the homeland of the race and under the common flag these Britons from beyond the seas have shared the noble task of saving the ancient civilization of the Western world. The union of the British Commonwealth of Nations has proved itself necessary for the preservation of human freedom. The Great Charter of British Duties has

been sealed by the blood which its citizens from every quarter of the globe have so freely shed in a sacred cause.

A large proportion of the men of the Dominions are of course our brothers in the fullest sense—bone of our bone and flesh of our flesh. But we must not allow this fact to mask the fundamental importance of the common flag which is the symbol of the political union between British citizens.

The events of recent years have indeed demonstrated that normally the state has still a hold on the conscience and heart of civilized man which is supreme—stronger even than that of family affections or religious sympathy. In the great affairs of the life of the world the definite lead given to the citizen by his own government is seen to be all-important. When the flag of a state is unfurled, all those who own a common political allegiance, speaking generally, cleave to that flag wherever it is borne.

In view of these pregnant realities it may be worth while for every citizen of the Empire to draw aside for a moment from the interests of his local political life in order to consider what the state of Europe, or of the world at large, might at this time have been if the ideal of a little England had been realized in the latter part of the last century.

There can indeed no longer be any reasonable doubt that the continuance of the political union between the constituent parts of the British Commonwealth is an essential condition of the ability of these communities to fulfil their proper

function in the future. It is essential to the peace and welfare of mankind.<sup>1</sup>

The most effective way indeed in which the citizens of the British Empire can at the present time contribute to the maintenance of peace is by working for the consolidation of the great commonwealth which is in their keeping.

II. In order that the political union between Britain and the Dominions may be secure and permanent, the Dominions as well as Britain must enjoy self-government, and the wisdom of each of these communities must find expression through an organ common to the whole.

In respect of population, intelligence, moral elevation and vigour, and indeed of all the principal elements of national greatness, the Dominions already constitute a substantially important part of the Empire. Its present aggregate strength rests very largely upon them. In the near future their relative importance will almost certainly increase.

The tradition that representative government is an essential element in an advanced condition of freedom and political development is common to the citizens of European descent in all parts of the British Commonwealth. There is indeed a growing conviction among them that the more nearly a central government is representative of all the peoples over whom it bears sway, the more likely is its policy to be wise and just, and its action vigorous and efficient.

At present only the inhabitants of the United

<sup>1</sup> "We need to preserve our Empire not for ourselves only but for mankind" (Lord Rosebery).



Kingdom enjoy full self-government. The most important branches of administration are those concerned with foreign relations, Defence, and other matters of common concern to all the constituent communities of the British Commonwealth. In these functions the inhabitants of the Dominions have no constitutional participation. In the decision of their most important concerns they have no right to any share.

On the other hand, a Londoner whose imperial interests are controlled by a Parliament in which the views and feelings of the Dominions have no adequate representation does not enjoy the full advantages to which his citizenship in the British Commonwealth naturally and properly entitles him.

Accordingly, it is quite clear that the existing position of the Dominions in the constitution of the British Commonwealth is unreasonable and unsatisfactory. Its drawbacks have lately, indeed, been largely mitigated for the time being by voluntary measures wisely taken by the central government. But it is nevertheless absolutely necessary that the legal position should be changed fundamentally and permanently.

The citizens of the Dominions have marked their arrival at collective political maturity in the noblest way possible. The traditions and the flag of England have always been their birthright. They have now shown that they are in every respect qualified to enter into active participation in the administration of the great commonwealth which is as truly theirs as ours. Equally manifest is it that, by every title which blood relationship, affec-

tion, and generosity can create, there is firmly established on the part of Britain an enduring right to their boundless devotion, their constant counsel, and their ever ready aid.

These decisive facts are now realized on both sides. Only when they are frankly and fully recognized in our political relations—when our constitutional system corresponds to the needs and aspirations of the aggregate commonwealth—will the British union be properly and adequately assured.

III. In order that the inhabitants of the Dominions may enjoy full self-government and the United Kingdom may secure the benefit of their participation in the affairs of common interest to all parts of the Empire, the federation of the British Commonwealth of Nations is necessary.

It may well be that, for an indefinite period, public opinion would be satisfied by the attendance of representatives of the Dominions at Cabinet Councils held in London. But any arrangements made to secure such attendance and so to give effect to the views of the overseas representatives would necessarily be tentative and temporary.

It is a condition of the smooth and efficient working of the constitution of the British Commonwealth—as indeed of any form of Cabinet government—that the central executive council, however it may be constituted, should be responsible to a Parliament and to one Parliament only. Accordingly, nothing but the establishment of a Parliament of the Union, containing representatives of the Dominions as well as of the United Kingdom—in other words, nothing but the federation of the

Empire—can possibly provide a permanently satisfactory government. It is the duty of experts to demonstrate the truth of this proposition to the plain men with whom the momentous decision in this matter must ultimately rest.

The fullest appreciation of all the material facts and the relative principles of political science and jurisprudence will result in the conviction that the constitutional position of the Dominions can be rendered satisfactory only by federation.

IV. Inasmuch as federation is necessary any difficulties in carrying it into effect must be surmounted.

It is not to be supposed that a great scheme of constructive legislation, involving the assent of several parliaments sitting in different parts of the world—the making of a constitution which will be the greatest and most beneficent achievement in the history of human institutions—can be accomplished without the earnest efforts of many of the best minds in every quarter of our vast Empire.

The truth, however, is that there is no obstacle in the way of Imperial Federation which cannot be overcome by the wisdom of our statesmen and lawyers and the intelligence and goodwill of the people.

Some of the difficulties incident to the construction of a federal system and to its subsequent working are due to mere prejudices which should yield before adequate discussion : others are tending every year to diminish in importance.

The alleged jealousy on the part of the Dominions of any arrangements which would in any way impair the full local autonomy which they now enjoy

is an instance of the former. It is of course evident that a central government representative of every part of the Empire will exercise ampler functions than those which are now fulfilled by the government of the United Kingdom. It is impossible that any Dominion should acquire a share in the control of the concerns of the United Kingdom and the other Dominions without investing the latter with some share in the control of its own affairs. But the prejudice against this consequence of federation should disappear when the practical aspect of the matter is fully realized. The local autonomy without Imperial responsibilities which the Colonies have hitherto enjoyed is an unnatural condition which cannot last indefinitely. A choice as to the new position has to be made ; and it lies between some surrender of local autonomy in exchange for security and a share in a world-wide commonwealth on the one hand, and the continued possession of full autonomy for the time being coupled with the risk of its complete extinction at the hands of a foreign power on the other. " The Federation of free Commonwealths is worth making some sacrifice for. One never knows when its strength may be essential to the great cause of human freedom, and that is priceless." <sup>1</sup>

Similarly fallacious in character is the widely prevalent view that British institutions have owed their practical excellence to the fact that they have grown up by a natural process of development without intention or design on the part of anyone, and that a deliberate attempt at constitution-making

<sup>1</sup> Mr. Lloyd George speaking at the Colonial Conference in 1907 : Minutes of the Proceedings, Cd. 3523, p. 362.



for the Empire, not being in harmony with such growth, would be unsuccessful. Such ideas as these must yield to an intelligent appreciation of the salient facts of the history of the British Constitution. Neither the Parliament nor the judicial system of England was in any sense a natural growth. Both were the results of the deliberate initiative and constructive ability of extraordinarily wise and bold men like Henry II, Simon de Montfort, and Edward I. If these statesmen and others like them, from Alfred the Great to the master-minds of our own times, had been the victims of this strange obsession as to the futility of creative genius in constitutional affairs, it is reasonably certain that there would have been no British Empire to stand in need of federation. Let us face the truth at once that there is no more possibility of a satisfactory union of the British Commonwealth being achieved without conscious effort and deliberately constructive action than there is of a railway being evolved by natural processes beneath the oceans by which its various territories are separated. Under no circumstances will any Parliament ever represent the Dominions as well as the United Kingdom unless representatives of all these communities in concert together devise and construct its constitution.

The difficulties incident to the great distances between the United Kingdom and most of the connected countries are among those which will tend to diminish with the passage of time. No doubt for a considerable period practical inconveniences of serious dimensions due to this physical reason would be experienced in the working of the new

constitutional system. But with every improvement effected in the means of transit or communication these inconveniences would diminish.

It seems probable that in the long run the most comprehensive scheme of federation would prove the best. Already the claims of India to participation in the supreme councils of the Empire are receiving general recognition. The voices of Egypt, the Crown Colonies, and other dependencies will also doubtless demand attention when the great constitutional fabric is being erected. In this direction lie the most serious difficulties which are really inherent in the matter. In order to be in a position to grapple with them successfully, we have to grasp certain conceptions which are not usually necessary as a part of the mental equipment of an inhabitant of Great Britain. In the first place, it has to be realized that, in certain states of social life, a community may be represented to its own satisfaction by persons who have not been elected as its representatives on the basis of a democratic franchise. In the second place, we must appreciate the fact that numbers have a widely different significance in the East from that which they have in the West. It is clear that the representation of the parts of the Empire now under consideration would have to be provided for in ways very different from that of the Dominions. But the men of the race which has been equal to the task of the government of India and Egypt will be equal also to the task of bringing them into effective consultation in the central council of the Empire.

## THE EXTENSION OF THE UNION

The importance of federation is not limited to the effects which it will have in securing, as nothing else can, the continuance of the connexion between the communities which at present constitute the British Empire and in strengthening and consolidating the entire Commonwealth. It would also provide an elastic constitutional system into which it would be possible for states which are now outside the Empire to be received as self-governing dominions.

We have seen that the conception of the independence of small states and of their equality with the Powers is an illusion. This is indeed practically demonstrated by the numerous treaties in which one or more of the Powers have guaranteed the territorial integrity or the neutrality of such states. Treaties of this kind are, however, by no means entirely satisfactory methods of accomplishing their objects. Responsibility should be accompanied by power, and an individual or state which undertakes the protection of another should have corresponding rights over the conduct of the latter. It is not consistent with good sense that a Power which undertakes to protect a small state should have no special right of control over its foreign policy or colonial enterprises. On the other hand, it is quite natural and reasonable that a small state, proud of its history and with the consciousness of fitness for self-government, should, although anxious for the protection of a Great Power, be unwilling to sacrifice its status to the extent which

would be involved by incorporation in its dominions as a dependency.

But a small state which should become one of the constituent communities of the British Commonwealth would sacrifice nothing substantial while its gain would be immeasurable. It would preserve its separate identity, together with its local autonomy, its representative institutions, and its national traditions. It would gain for its separate existence, in lieu of a precarious tenure, a security like that which England enjoys for her own. In exchange for an illusory independence, it would acquire the maximum of possible power—a proportionate share in the government of the greatest state of all time. The commonwealth itself, by admitting a new partner, would incur the burden of a correlative responsibility; but its aggregate strength would, generally speaking, be correspondingly increased.

Already nations of the most varied origin and character are comprised within this great union. Yet the room for others is still wide as ever. And for those who, from time to time, may desire to realize their highest destiny within its borders it should always remain possible for the portals to be thrown open.

The probability that states which are now foreign to the British Union may hereafter be received into its federal system has a direct and immediate bearing on the great problem which is the subject of this treatise.

“It may be demonstrated,” said Kant,<sup>1</sup> “that the idea of a confederation which shall gradually extend to all states and thus lead them insensibly

<sup>1</sup> See Wheaton's *History of the Law of Nations*, p. 752.



to universal and perpetual peace, is not an impracticable or visionary idea. It may be realized, if happily a single nation, equally powerful and enlightened, could once constitute itself as a republic" (by which Kant means a state in which representative government is established, whether or not it has a hereditary monarchy) "—a form of government naturally inclined to perpetual peace. A common centre would thus be created for this federative association, around which other states would cluster in order to secure their liberties according to the principles of public law, and this alliance would finally become universal."

In this way, at all events, the Pax Britannica might be indefinitely extended; and with every extension the greater would be the power and influence of Britain as Conservator Pacis.<sup>1</sup>

Beyond these considerations there is another which is perhaps more important still. Reorganization upon a federal basis would render the British Commonwealth, as a corporate whole, more closely analogous than it now is to the great Republic of the West. It would therefore facilitate the approximation of these two political aggregates towards that substantial unity—that "conscious and leagued" community of function in the service of mankind—in the prospect of which are to be found the world's best hopes for the future.

Accordingly it would seem that, of all the con-

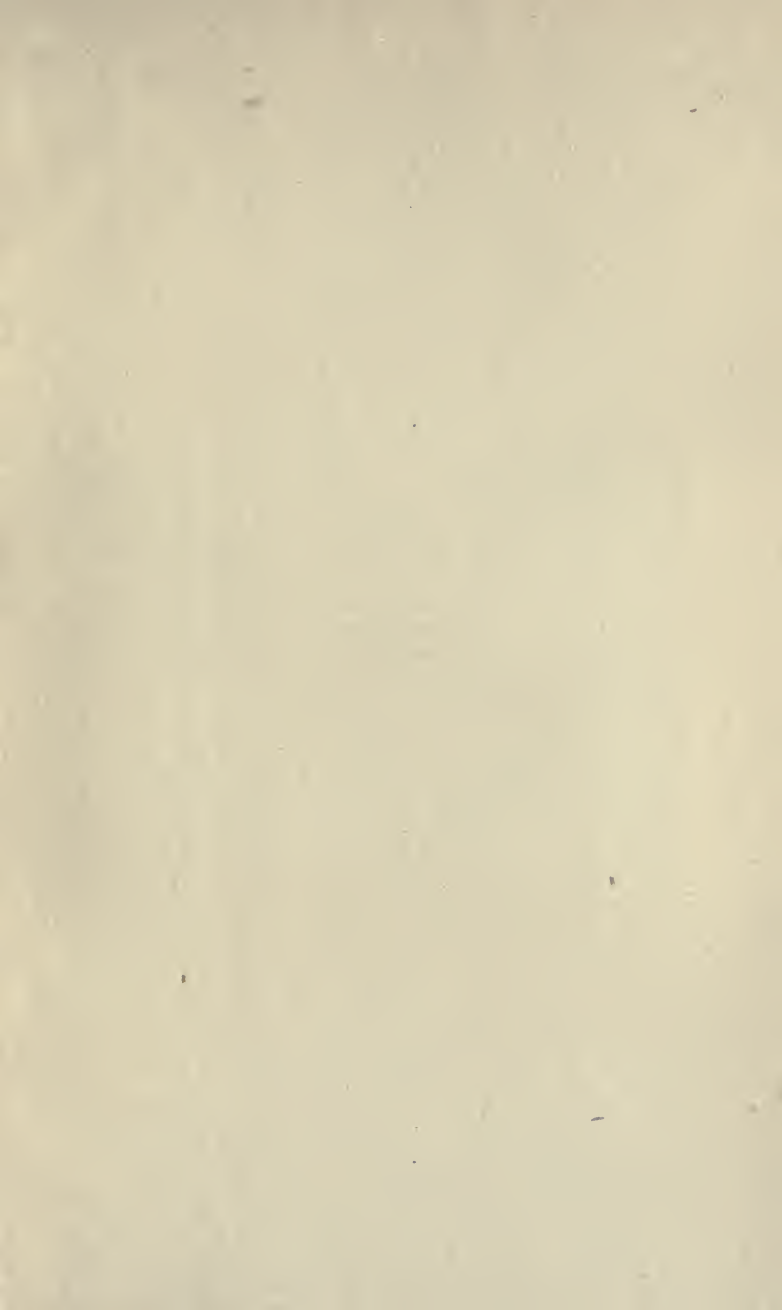
<sup>1</sup> The establishment of a protectorate, which is an available alternative to full incorporation in the federal system in the case of a comparatively backward community, constitutes an analogy to an extension of the king's peace to a particular individual in pre-Norman times. See Pollock and Maitland's *History of English Law*, 2nd ed. vol. i. p. 44, vol. ii. p. 453.

structive measures which are practicable in the immediate future, the most important and urgent, in the interests of peace, is the federation of the British Empire.

May the foundations of this federation be well and truly laid! For, until mankind have won their way to a stage upon their upward journey far higher than that which they have hitherto attained—until the world has been redeemed from egoism, cruelty, and strife, and has been gathered together in the eternal sunshine of the Shiloh of goodwill and peace—the union of the British Commonwealth must never fail, nor must the sceptre depart from its people.

PROPOSITION XVII.—The federation of the British Commonwealth of Nations is an essential condition of the maintenance of general peace.

PRINTED BY  
MORRISON AND GIBB LTD.  
EDINBURGH





THIS BOOK IS DUE ON THE LAST DATE  
STAMPED BELOW

AN INITIAL FINE OF 25 CENTS  
WILL BE ASSESSED FOR FAILURE TO RETURN  
THIS BOOK ON THE DATE DUE. THE PENALTY  
WILL INCREASE TO 50 CENTS ON THE FOURTH  
DAY AND TO \$1.00 ON THE SEVENTH DAY  
OVERDUE.

MAY 2 1933

YB C6371

284417

JL 1753

42

UNIVERSITY OF CALIFORNIA LIBRARY

